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6 THE STATE OF CALIFORNIA  
7 STATE WATER RESOURCES CONTROL BOARD

8 IN THE MATTER OF: ) PETITION FOR REVIEW OF CLEANUP AND  
9 ) ABATEMENT ORDER NO. R9-2008-0152 OF  
10 THE CALIFORNIA REGIONAL WATER ) CALIFORNIA REGIONAL WATER QUALITY  
11 QUALITY CONTROL BOARD, SAN DIEGO ) CONTROL BOARD, SAN DIEGO REGION  
12 REGION, ) ISSUED TO DR. BILL AND LORI MORITZ  
13 )  
14 v. ) POINTS AND AUTHORITIES IN SUPPORT  
15 ) (APPENDIX A)  
16 )  
17 ) REQUEST FOR STAY OF ENFORCEMENT  
18 ) (APPENDIX B);  
19 DR. WILLIAM and LORI MORITZ )  
20 ) AND REQUEST TO SUPPLEMENT THE  
21 ) RECORD (APPENDIX C)  
22 )  
23 ) [Water Code § 13320; 23 Cal. Code Regs §§ 2050,  
24 ) 2050.6, and 2053]  
25 )  
26 ) Date of RWQCB Action: Feb 11, 2009  
27 )  
28 )

20 Dr. William Moritz and Lori Moritz, Petitioners, submit the following Petition for Review of  
21 Cleanup and Abatement Order R9-2008-0152 of the California Regional Water Quality Control Board  
22 for the San Diego Region, Request to Stay Enforcement, and Request to Supplement the Record.

23 1. **Name and Address of Petitioner:**

24 DR. BILL AND LORI MORITZ  
25 14272 Jerome Drive,  
26 Poway, California 92064.  
27 [DrBill@ShareKids.com](mailto:DrBill@ShareKids.com)  
28 **Petitioners**

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**Attorneys for Petitioner**

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2       **2. The Specific Action or Inaction of the Regional Board Which Petitioner Requests the State**

3       **Water Board to Review:**

4           Petitioners request review, rescission, withdrawal, or dismissal of Cleanup and Abatement Order  
5 No. R9-2008-0152 (hereinafter "CAO") issued on February 11, 2009 by the San Diego Regional Board  
6 that orders Bill Moritz alone to perform certain acts under specific imminent deadlines. A copy of the  
7 order is attached as Appendix D.

8           Alternatively, Petitioners request that the State Water Resources Control Board ("SWRCB")  
9 honor the rule of law promulgated in 23 Cal. Code Regs § by applying consistent standards to similar  
10 circumstances by naming other dischargers as authorized by law, including (1) the City of Poway that  
11 caused or permitted unrestrained storm-water flow across the Petitioners' property, conditions that  
12 Petitioners' conduct sought to correct; (2) adjacent landowners who, as has been alleged as to  
13 Petitioners, filled a dry wash/ephemeral stream and graded without a City of Poway grading permit; and  
14 (3) other neighbors who, as has been alleged as to Petitioners, installed culverts on or in their property  
15 within a dry wash/ephemeral stream within approximately 100 yards of Petitioners' property, but  
16 without any permit, authorization, or governmental liability whatsoever. Either the CAO ought to be  
17 modified to treat all such dischargers alike, or none of them ought to be named, and the CAO dismissed.

18       **3. The Date on Which the Regional Board Acted or Refused to Act:**

19           The Regional Board adopted its CAO on February 11, 2009. (Appendix D.) Petitioners'  
20 evidentiary submittal is set forth in Appendix E, consisting of 20 exhibits. At the February 11, 2009  
21 administrative hearing, petitioners presented opening remarks, testimony, and closing remarks.  
22 Petitioners' opening and closing remarks were illustrated by separate Power Point slides, timely and  
23 properly submitted to the Regional Board, made part of the record, and attached here as Appendices F  
24 and G. Evidentiary exhibits that are part of the record are attached as Appendix H. The transcript of  
25 proceedings is not attached, but is requested as part of the Request to Supplement the Record (Appendix  
26 C).

1       **4. The Reasons Why the Regional Board Action or Failure to Act was Inappropriate or**  
2 **Improper:**<sup>1</sup>

- 3       a. The Regional Board improperly denied evidentiary objections, then improperly received and  
4       relied upon evidence subject to exclusion. Submittals relating to the evidentiary issues are  
5       set forth in Appendix H. The RWQCB received and relied on hearsay evidence, over  
6       objection, evidence that would not have been admitted at trial, and the only evidence on  
7       multiple points supporting multiple findings, contrary to the requirements of Government  
8       Code section 11513. The RWQCB also improperly received and relied on evidence gathered  
9       in warrantless searches.
- 10      b. Via the CAO, the Regional Board improperly is asserting regulatory authority over a dry  
11      wash, dubbed an ephemeral stream, which flows approximately 3 days per year. Consistent  
12      with the United States Supreme Court's decision in *Rapanos v. United States* 547 U.S. 714  
13      (2006), Water Code section 13050 (e) does not and should not categorically include within  
14      the phrase "waters of the state" such dry washes or ephemeral streams in which water flows  
15      three days per year because rules of statutory construction should not be applied so as to  
16      confer regulatory authority over all such dry land on which water falls; the legislature could  
17      and should have specifically included such dry washes dubbed ephemeral streams or all land  
18      on which water falls had it intended to confer to the state and regional boards such regulatory  
19      authority.
- 20      c. Via the CAO, the Regional Board is improperly considering useful, usable fill material and a  
21      pipe as "waste" notwithstanding the fact that the statutory definition of the term "waste" set  
22      forth in Water Code section 13050 (d) includes neither by definition nor by categorical  
23      examples the usable and useful fill material or pipe that here was specifically intended to  
24      protect Petitioners' property from unconstrained City of Poway storm waters, and from the  
25      related scouring and sedimentation. Had the legislature intended to include such fill within  
26      the definition of "waste," it could have and should have done so specifically or by including  
27      it within either a definition that would include usable, useful fill materials and pipes, or by

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<sup>1</sup> Each of these issues is discussed in separate Points and Authorities, attached as Appendix A.

category used to exemplify the meaning of the term “waste,” as used in the definitional statute. The statute’s clear and unambiguous meaning *excludes* useable and useful fill and pipes from the definition of “waste,” and principles of statutory construction do not permit the broad meaning that RWQCB ascribes to the term.

- d. Absent a discharge of “waste” into “waters of the state,” there is no need for Waste Discharge Requirements (WDRs), ne need for Reports of Waste Discharge (“RoWDs”), and thus no violation of Water Code sections 13260 and 13264, rendering issuance of the CAO improper.
- e. Absent a discharge of “waste” into “waters of the state” or into “waters of the United States,” there is no violation of the Basin Plan for the San Diego region, making issuance of the CAO improper.
- f. Absent a discharge or deposit of “waste” into “waters of the state” there is no pollution, contamination, or nuisance that can justify issuance of a cleanup and abatement order pursuant to Water Code section 13304, making issuance of the CAO improper. There is no “threat” because a mere possibility of an occurrence is not a substantial probability of an occurrence, and the latter is *required* under Water Code section 13304.
- g. Even if issuance of the CAO were otherwise proper, the Regional Board’s CAO violates Water Code section 13360 by specifying the specific design or method of compliance. Regional Board staff admitted that the point of the order is to specify the design — to return the stream exactly to an earlier condition as the *only* allowable method of compliance — thus precluding alternate means of achieving water quality objectives and compliance.
- h. The Regional Board improperly issued the CAO notwithstanding the absence of any evidence of degradation of water quality. The Regional Board had no evidence of background or upgradient water quality condition, and no evidence of any impacts by the site downgradient. The RWQCB has no record evidence to demonstrate the creation or the threatened creation of a condition of pollution or nuisance within the meaning of the San Diego Basin Plan , or of Water Code sections 13050 and 13304.

- 1 i. The Regional Board failed to honor Governor Schwarzenegger's Executive Order S-13-07,  
2 an emergency suspension of statutes, rules, and regulations pertaining to the removal,  
3 storage, and disposal of hazardous and nonhazardous debris, and necessary restoration and  
4 related activities pertaining to the Witch Creek fires. The Moritzes' were at the very edge of  
5 the Witch Creek fires, and had taken the steps alleged by RWQCB to protect and the restore  
6 their property from subsequent related storm-water flows, and to repair subsequent scours  
7 and sediment flows, conduct that could have and should have qualified for a categorical  
8 exemption under the governor's Executive Order.
- 9 j. The Regional Board violated 23 Cal. Code Regs § 2907 and Water Code section 13241 by  
10 failing to take into account the dischargers' resources and economic considerations in  
11 determining schedules for investigation and cleanup and abatement or for establishing water  
12 quality objectives for the Petitioners' watershed.
- 13 k. The Regional Board violated 23 Cal. Code Regs §2907, which requires the naming of other  
14 dischargers and requires consistent standards for similar circumstances (1) by failing to name  
15 the City of Poway whose uncontrolled storm waters repeatedly and annually with significant  
16 storm events scour the Moritzes' property and deposit sediment thereon, notwithstanding the  
17 fact that the Moritzes are being held to account for the mere possibility of such effects on  
18 downgradient property; (2) by failing to name other upgradient property owners who have  
19 failed to implement any sedimentation or erosion-control best management practices, have  
20 graded in the very same dry wash/ephemeral stream within less than 100 yards of the  
21 Moritzes' property, notwithstanding the fact that the Moritzes are being held to account for  
22 this very conduct; and (3) by allowing the existence in multiple locations within 100 yards of  
23 the Moritz property multiple pipe culverts within dry washes/ephemeral streams,  
24 notwithstanding the fact that the Moritzes are being held to account for a similar pipe culvert.  
25 RWQCB should have honored the rule of law by applying consistent standards and treating  
26 all dischargers alike by either naming other dischargers or by dismissing the CAO —  
27 otherwise 23 Cal. Code Regs § 2907 becomes meaningless surplusage, contrary to rules of  
28

1 statutory construction. The SWRCB thus should modify the CAO to name all dischargers, or  
2 should dismiss the CAO.

- 3 1. If indeed there was actionable discharge of “waste” into “waters of the state,” the Regional  
4 Board acted improperly by failing to issue a waiver from waste discharge requirements  
5 pursuant to Water Code sections 13260(a), (b), 13263(a), 13264(a)(3), and 13269.

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7 **5. The Manner in Which Petitioner is Aggrieved:**

8 Petitioners are the individual owners of a single-family residence without the resources of a  
9 typical industrial, commercial, or municipal discharger. They have no insurance — their carrier has  
10 denied coverage. The Moritzes’ equity in their home and other financial resources have evaporated as a  
11 consequence of California’s economic conditions. They simply do not have the resources to comply  
12 with the CAO.

13 Petitioners installed the pipe within their property as an effort to protect their property against  
14 uncontrolled but rare storm-water flows, modeling the pipe after multiple other culverts within 100  
15 yards of their property, within the same watershed. Petitioners attempted to protect their property while  
16 not adversely affecting water quality by piping sediment and storm waters from one side of the property  
17 to the other without adding to the sediment load.

18 Petitioners are now required by the Regional Board’s CAO to remove the pipe and to restore the  
19 streambed, without any alternative means of compliance, and without any evidence that petitioners have  
20 adversely affected water quality. Engineering costs alone are projected to exceed \$60,000, exclusive of  
21 the costs of implementation. But why? Why not leave the pipe — just like it exists on other properties  
22 in the area? Absent strict compliance, the Petitioners are subject to the prospect of Administrative Civil  
23 Liability of more than \$1,000 daily. The Petitioners simply do not have the financial ability to comply  
24 with the CAO.

25 The demands of the Regional Board upon Petitioner are in gross disproportion to the Petitioner’s  
26 resources. The regulation of storm water management on a single family residence property by a CAO  
27 is unusual, particularly in a watershed largely managed — or mismanaged — controlled by the City of  
28 Poway. Had the City of Poway more properly managed its storm water, petitioners would not have

1 needed the pipe to protect their property. This is in issue in litigation pending between the City of  
2 Poway and the Petitioners. Now that the Petitioners installed a pipe to protect their property from storm  
3 waters emanating from City-of-Poway sources, the Petitioners are being forced to remove the very  
4 device used to prevent their property's further damage. The City of Poway ought to be named in the  
5 order so that the City of Poway is forced to take measures to prevent storm water flows that have in the  
6 past and will continue in the future to impact the Moritzes property with erosion scours and sediment.  
7 The city government thus would be required to implement *unified, cohesive* storm-water management,  
8 rather than go after individual property owners such as Petitioners who have tried piecemeal to solve  
9 storm-water issues by themselves.

10 **6. The Specific Actions by the State or Regional Board Which Petitioner Requests:**

11 The petitioners request that the State Board rescind or modify the CAO, suspend the  
12 implementation of the CAO, and accept additional evidence that likely will come to light during the  
13 litigation with the City of Poway. More specifically, the petitioners request:

- 14 a) That the State Board rescind, dismiss, or withdraw the CAO;
- 15 b) That the State Board waive all monitoring, reporting, cleanup, abatement, and removal  
16 requirements contained within the cleanup and abatement order imposed upon Petitioner;
- 17 c) That the State Board modify the CAO to name other dischargers including at a minimum  
18 the City of Poway, but perhaps also adjacent or other upgradient landowners whose  
19 conduct caused or contributed to the scours and sediment-control problems that have  
20 adversely affected, and will likely continue to affect the petitioners' property, as well as  
21 those others in the area who caused or permitted culverts like the Petitioners' pipe to exist  
22 on their properties without any permitting or governmental liability;
- 23 d) That the State Board suspend the CAO, taking into account the absence of the petitioners'  
24 resources to respond to the problem, and suspend any further action against Petitioner  
25 concerning monitoring, reporting, cleanup, abatement and removal requirements under  
26 the cleanup and abatement order until the responsibility of the City of Poway and/or other  
27 property owners for conditions in the storm water drainage channel is established.

- 1 e) That the State Board receive such additional evidence as comes to light in the litigation  
2 with the City of Poway.  
3 f) That the State Board stay enforcement of CAO R9-2008-0152. (See attached Appendix  
4 B, the Petitioners' Request for Stay of Enforcement.)

5 **7. Points and Authorities in Support of Legal Issues Raised in the Petition:**

6 Please see the accompanying Points and Authorities in support of this Petition, attached as  
7 Appendix A.

8 **8. Statement of Copies Furnished:**

9 In accordance with the requirements of Title 23, section 2050(a)(8) of the California Code of  
10 Regulations, a copy of this petition has been sent to the executive director of the California Regional  
11 Water Quality Control Board, San Diego Region.

12 **9. Statement as to Substantive Issues and Objections:**

13 All substantive issues and objections raised herein were raised before the Regional Board either  
14 as part of the administrative record, as part of the February 11, 2009 evidentiary submittals, as part of  
15 evidentiary objections, or orally or visually at the hearing.

16 Dated: March 6, 2009

17 THE SIMPSON LAW FIRM,  
18 A Professional Corporation  
19 Attorneys for Dr. Bill Moritz

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21 By: Douglas J. Simpson  
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8 **THE STATE OF CALIFORNIA**  
9 **STATE WATER RESOURCES CONTROL BOARD**

10 IN THE MATTER OF:

11 )  
12 )  
13 THE CALIFORNIA REGIONAL WATER )  
QUALITY CONTROL BOARD, SAN DIEGO )  
14 REGION, )

15 v. )

16 )  
17 DR. WILLIAM and LORI MORITZ )  
18 )

APPENDIX A

POINTS AND AUTHORITIES IN SUPPORT  
OF PETITION FOR REVIEW OF CLEANUP  
AND ABATEMENT ORDER NO. R9-2008-  
0152 OF CALIFORNIA REGIONAL WATER  
QUALITY CONTROL BOARD, SAN DIEGO  
REGION ISSUED TO DR. BILL AND LORI  
MORITZ

[Water Code § 13320; 23 Cal. Code Regs §§  
2050, 2050.6, and 2053]

Date of RWQCB Action: Feb 11, 2009

19 Dr. William Moritz and Lori Moritz, Petitioners, submit the following Points and Authorities in  
20 Support of Petition for Review of Cleanup and Abatement Order R9-2008-0152 ("CAO") of the  
21 California Regional Water Quality Control Board for the San Diego Region ("RWQCB").  
22

23 **FACTUAL BACKGROUND**

24 Bill and Lori Moritz live in a residential area of the City of Poway. Their yard is dry, except for  
25 approximately 3 days per year when significant storm waters flow from upgradient areas — then the  
26 flow is significant, causing scours and sedimentation on the Moritzes' property. The headwaters of the  
27 intermittent storm-water flow are impervious City of Poway streets that flow into unlined earthen  
28 swales.

1 The City of Poway controls or fails to control upgradient storm water flow, as separately alleged  
2 in pending litigation<sup>1</sup>. The City of Poway is a subpermittee of the RWQCB's NPDES permit for storm  
3 water management, and has a continuing mandatory duty to properly plan for and to properly manage  
4 storm water within the City<sup>2</sup>.

5 Storm waters in the San Diego area were a significant problem following San Diego's October  
6 2007 Witch Creek fires, fires that nearly engulfed Petitioners' property. (Appendix E, Exhibit 1.)  
7 Petitioners' property suffered scours and sedimentation from uncontrolled storm waters in significant  
8 rain events thereafter. Bill Moritz resolved to repair the damage and to protect the property in the future  
9 by performing some grading on his property in the November through February 2007/2008 timeframe.

10 Bill Moritz's activity was categorically authorized by Governor Schwarzenegger. (Appendix E,  
11 Exhibit 2.) Governor Schwarzenegger recognized that the impacts of the Witch Creek fires were so  
12 significant that he suspended WDR requirements and authorized restoration work in affected areas. (*Id.*  
13 at paragraph 3.)

14 Notwithstanding Gov. Schwarzenegger's *unconditional* suspension both of WDRs and of related  
15 work that categorically authorizes Bill Moritz's conduct, the San Diego Regional Board placed *multiple*  
16 *conditions* on Gov. Schwarzenegger's directive. (Appendix E., Exhibit 3.) The effect of the RWQCB's  
17 issuance of Order R9-2007-0211 that imposed at least 13 conditions on the governor's unconditional  
18 executive order was to prevent Bill Moritz's conduct from gubernatorial authorization, instead subjecting  
19 him to RWQCB liability for failure to comply with the RWQCB's 13 conditions, including the failure to  
20 make a prior application or obtain prior written authorization of the RWQCB. Sophisticated  
21 governmental entities skilled in environmental compliance, environmental law, and familiar with the  
22 existence of the RWQCB easily obtained waivers of WDR requirements because of the Witch Creek  
23 fires, whereas individuals including the Moritzes who less sophisticated in the ways of environmental  
24

25  
26 <sup>1</sup> San Diego Superior Court civil action number 37-2008-00088427-CU-MC-CTL. Among other things, the Moritzes allege that the City of Poway caused or  
27 contributed to the Moritzes' damages by breaching mandatory duties to properly manage storm waters, duties prescribed by San Diego RWQCB order R9-  
2007-0001, which is intended to protect the Moritzes and others from such harm. As separately requested, enforcement of the CAO should be stayed  
pending the outcome of that litigation which addresses many of the issues raised before the RWQCB.

28 <sup>2</sup> See San Diego RWQCB order R9-2007-0001, and its predecessor R9-2001-0001. Breach of the mandatory duty to control storm waters is one of the  
Moritzes' claims against the City of Poway. Had Poway properly controlled its storm waters, there would have been no need to repair the damage, the case  
would not be before the court, and they likely would have been no RWQCB action.

1 compliance, environmental law, and unaware of the existence of RWQCB were unfairly exposed to  
2 liability as to statutes and regulations that the governor had unconditionally suspended.

3 The City of Poway observed Bill Moritz in his yard driving a tractor repairing ruts and gullies.  
4 The City observed the conduct — and approved it — before it denied it. Flip-flopping repeatedly on the  
5 issue, the City of Poway *specifically authorized* Bill Moritz's continued grading activities on the site,  
6 and told him that he *needs no permit* for the work being performed. For example, City employee, David  
7 Rizzuto, testified in deposition that he believed Bill Moritz's grading complied with a Poway ordinance  
8 that specifically permits certain grading:

9 Q. He told you that he'd actually been down to the city?

10 A. I couldn't tell you his exact phrasing of it, but that he expressed an understanding of  
the limitations of the ordinance at it applied to the work he was doing.

11 Q. Did you issue any stop work notice or citation?

12 A. I did not.

13 Q. Why is that?

14 A. Again, because my opinion of the work that was ongoing at that time was that it did  
not exceed the criteria of the provisions for landscaping. [Deposition of David  
Rizzuto at 14:3-14: 13.]

15 Q. Did you tell him that it was okay to proceed as long as he stayed within the confines  
of the grading ordinance as you described it?

16 A. As it applies to landscaping, yes. [Deposition of David Rizzuto al 19: 12-20:2.]

17 The City of Poway has an ordinance that allows grading, *without a permit*, in certain  
18 circumstances. Apparently both Bill Moritz, David Rizzuto, and other City of Poway personnel  
19 believed that Bill Moritz's work fell within the ambit of a grading-permit exception. One such grading-  
20 permit exception, for example, states:

21 16.42.010 Permits required — Exceptions.

22 No person shall conduct any grading, excavation, earth moving, filling, clearing,  
23 brushing, or grubbing on natural or existing grade, or perform work that is  
24 preparatory to grading, without first having obtained a valid grading permit,  
25 stockpile permit, or administrative clearing permit in accordance with this  
division, *except for the following*:

26 ...

27 J. Excavation or fill on a developed parcel of land that is done for the purposes of  
28 minor landscaping improvements or recreational purposes and which:

1. Is a minimum of 10 feet away from any structures and three feet from any property line, unless entirely contained by a retaining wall;
2. ***Does not exceed 250 cubic yards of total excavation and fill;***
3. Does not exceed three vertical feet in depth;
4. Does not create a cut or fill slope greater than five feet in height nor a slope steeper than three horizontal to one vertical (3:1);
5. Does not divert, concentrate or otherwise alter surface or subsurface drainage as it leaves or enters adjacent properties;
6. Is not undertaken within any open space, utility, access or other easement; and
7. Is not in an area where any structure is planned, including patios, swimming pools and accessory structures. (Poway Municipal Code section 16.40 2.010, emphasis added.)

Although some City employees like David Rizzuto believed and told Bill Moritz that he needed no permit, others took issue with work he was performing. Bill Moritz steadfastly believed that he needed to protect his property. Moreover, neighbors and he had discussed similar work in the area, and similar work in the area had occurred, was occurring and has since occurred without any action by any governmental entity whatsoever.

Ultimately Bill Moritz prepared a sketch of a stone-creek design that he envisioned for the property. (Appendix E, Exhibit 8.) But six weeks passed with no City of Poway rejection and no City of Poway approval of that design.

On May 14, 2008, having spoken with civil engineers concerning the best method to protect his property from future scours and sedimentation, Bill Moritz filled out and paid for a Notification of Streambed Alteration at the Department of Fish & Game. (Appendix E, Exhibit 9.) In designing the culvert to protect his property from the City of Poway's storm water, he took inspiration from other culverts in the area. (Appendix E, Exhibit 10.)

Five days after submitting the Notification of Streambed Alteration, the City of Poway sent Bill Moritz correspondence complaining (1) that material had been deposited in a watercourse which might impede the flow of water and (2) that the surface of land have been altered to reduce the capacity of the watercourse. (Appendix E, Exhibit 11.) He was told to correct the violations by June 2, 2008, approximately 10 days after receipt of the letter. Bill Moritz understood this letter as the City's directive to immediately install the pipe for which he had filled out the Notification of Streambed Alteration five days before. Accordingly, he immediately gathered together a small army of friends, located and

1 immediately bought an \$8600 pipe, then worked feverishly over Memorial Day weekend, canceling  
2 plans with family, to install the pipe.

3       Thereafter, the City of Poway took issue with the existence of the pipe. The City of Poway  
4 alerted the San Diego RWQCB who sent its staff person, Christopher Means, to visit the site on June 9,  
5 2008, leading to an initial CAO, CAO R9-2008-0074.

6       Christopher Means visited the site twice, but only once before issuing the initial CAO, which  
7 RWQCB rescinded in October 2008. Christopher Means' only visit *before* issuance of the cleanup and  
8 abatement order was on June 9, 2008, without any administrative warrant issued pursuant to California  
9 Code of Civil Procedure section 1822.50, et seq. In order to get to the property, Christopher Means had  
10 to travel across multiple pieces of private property down a road marked with two "no-trespassing" signs.  
11 (Appendix H<sup>3</sup>.) The Moritzes had a reasonable expectation of privacy given the configuration of their  
12 yard surrounded by fences and vegetation.

13       The San Diego RWQCB issued a tentative CAO set for hearing on February 11, 2009. The  
14 parties submitted evidentiary documents (Appendix E) as well as evidentiary objections (Appendix H.)  
15 The RWQCB overruled the Moritzes' objections, received evidence for approximately 1 1/2 hours  
16 including Power Point presentations (Appendices F and G), then without any deliberation of any  
17 significance, unanimously approved RWQCB staff's tentative order.

18       The CAO as issued requires *immediate* sediment and erosion-control measures, notwithstanding  
19 the absence of such requirements imposed on the City of Poway and notwithstanding the absence of  
20 such requirements imposed on upgradient properties (see Appendix E, Exhibit 15) that continue to erode  
21 and to deposit sediment on the Moritzes' property. Additionally, the CAO requires engineering and  
22 permits likely to cost in the range of \$60,000 exclusive of implementation of plans. (Appendix E,  
23 Exhibits 13 and 14.)  
24  
25  
26

27 <sup>3</sup> After the Moritzes and the RWQCB Prosecution Team had submitted their respective evidentiary objections, Catherine Hagan George of the RWQCB  
28 advisory team via a February 3, 2009 e-mail (1) invited both parties to "submit any legal arguments concerning the evidentiary objections they wish the  
Advisory Team to consider, and (2) invited the Moritzes to also supplement their earlier-submitted reply to the Prosecution Team's evidentiary objections.  
The Moritzes accepted the opportunity to submit "any legal arguments concerning the evidentiary objections" by filing their "Third Evidentiary Objections  
Submittal." (Appendix H.) After some debate, RWQCB considered arguments raised in all of the Moritzes' submittals as indicated in the February 10, 2009  
Catherine George Hagan letter. (See Appendix H.)

1 For the reasons set forth in the petition, these points and authorities and elsewhere in this appeal,  
2 the Moritzes respectfully request that the court rescind, withdraw or modify CAO R9-2008-0152.  
3 Arguments set forth in these Points and Authorities are lettered to correspond with the statement of  
4 reasons that the Regional Board's action or failure to act was improper.

5 **A. THE REGIONAL BOARD IMPROPERLY DENIED EVIDENTIARY OBJECTIONS, THEN**  
6 **IMPROPERLY RECEIVED AND RELIED UPON EVIDENCE SUBJECT TO EXCLUSION**

7 Submittals relating to the evidentiary issues are set forth in detail Appendix H. The RWQCB has not  
8 denied the absence of any warrant, and made no offer of proof to the contrary. Nowhere in the record is  
9 any evidence of RWQCB having procured a warrant, not is there evidence of circumstances excusing its  
10 absence.

11 The RWQCB does not deny that it conducted an administrative search. RWQCB does not assert  
12 that exigent circumstances made its search reasonable despite the absence of a warrant. Instead, the  
13 RWQCB relies assertion that regional board staff's observations were made from "the road," and were  
14 thus in plain view, excusing the RWQCB of warrant requirements.

15 The RWQCB then relies on hearsay evidence gathered from City, as exemplified by reliance on  
16 stop-work notices, themselves hearsay evidence that relied on warrantless searches, as well as on the  
17 City's Complaint. But reliance on such hearsay evidence gathered by warrantless searches is misplaced.  
18 All such evidence should be excluded, as should all the fruits of the warrantless searches — including  
19 the totality of this action because RWQCB was alerted by City only after the City's warrantless  
20 searches.

21 No City personnel testified at the February 11, 2009 hearing to support the hearsay evidence with  
22 non-hearsay evidence. But even if they had, the RWQCB's evidence still is tainted because it was  
23 procured only after warrantless searches.

24 The Moritzes timely objected to the admissibility of the hearsay evidence based on California  
25 Government Code section 11513 and California Evidence Code section 1200, et seq. The RWQCB's  
26 evidence was hearsay not within any exception. Although Government Code section 11513 permits  
27 consideration of hearsay evidence that is used to support or supplement *other* evidence, hearsay  
28 evidence *by itself* cannot be sufficient to support a finding:

1 Hearsay evidence may be used for the purpose of supplementing or explaining other evidence  
2 but over timely objection shall not be sufficient in itself to support a finding unless it would be  
admissible over objection in civil actions.” (Government code section 11513, subdivision (d).

3 RWQCB demonstrated no hearsay exception that could make admissible the hearsay evidence on  
4 which it relies, such as statements made to the RWQCB that the Moritzes had dumped fill into an  
5 ephemeral stream that had precipitated RWQCB's own warrantless search. Likewise, RWQCB relied on  
6 statements of others to suggest that sediment had migrated offsite. The record is devoid of *admissible*  
7 evidence justifying a warrantless search, and it cannot now properly be augmented to cure the defect.

8 The record is devoid of *admissible* evidence that justifies issuance of the CAO — RWQCB  
9 relied totally on hearsay evidence as the *sole* supporting basis for issuance of the CAO. Thus RWQCB  
10 never saw water flowing on the Moritzes' property, but instead relied on a hearsay photograph and  
11 hearsay discussions with others to establish that there once was water flowing on the Moritzes' property.  
12 The CAO should be rescinded or withdrawn because RWQCB did not have sufficient *admissible*  
13 evidence to warrant issuance of the CAO.

14 RWQCB staff, Christopher Means, acknowledged that he had no warrant when he first inspected  
15 the property on June 9, 2008:

16 Q Did you have an inspection warrant when you  
17 went out to my client's property on June 9, 2008?

18 A No.

19 Q Did Danis Bechter?

20 A I don't know.

21 Q Did Kelly Fisher?

22 A I don't know.

23 Q You guys went onto Sean Marsden's property?

24 A Yes.

[Deposition of Christopher Means at 26:9-15].

25 Moreover, as noted in Christopher Means' testimony, RWQCB's inspection was made from the  
26 *Marsden* property, *not* from the road as RWQCB suggests. Christopher Means testified at the February  
27 11, 2009 hearing that he had no warrant. Yet there is no evidence set forth in the record — the entirety  
28 of the RWQCB file — that RWQCB had permission or consent from the Marsden property's owner to  
be on that property to conduct the search.



1           Significantly, the only two roads leading to the Marsden's and to the Moritzes' property are  
2 *private* drives.<sup>4</sup> (See the Moritzes' Third Evidentiary Submittal within Appendix H, Attachments 1 and  
3 2.) Crocker Road is marked with two signs stating: "PRIVATE ROAD NO TRESPASSING  
4 RESIDENTS ONLY NOT A CITY TRAIL," and "NO TRESPASSING, and one marked "Private  
5 Road." (Moritzes' Third Evidentiary Submittal within Appendix H, Attachment 1.) Jerome Drive  
6 likewise is marked with a sign stating "Private Road." (Moritzes' Third Evidentiary Submittal within  
7 Appendix H, Attachment 2.)

8           The Marsden property thus is landlocked. (Moritzes' Third Evidentiary Submittal within  
9 Appendix H, Attachment 3.) Unless an inspector arrives by helicopter, the inspector must travel over  
10 individual property owners' property before even arriving at the Marsden property, because property  
11 owners in the area own Jerome Drive and Crocker Road to the center of those two streets.<sup>5</sup> Of course  
12 the inspector is performing warrantless searches on all such properties as he or she traverses them. In  
13 fact, the inspector is trespassing on all such properties, because the property owners in the area own to  
14 the center of the roads, Crocker Road and Jerome Drive. (See footnotes 3 and 4.)

15           Thus the RWQCB, and the City inspectors who alerted RWQCB to the existence of a concern as  
16 to the Moritz property, could not see the Moritzes' property from the public streets, so they traversed and  
17 trespassed over private property at the intersection of Crocker Road and Golden Sunset to the south,  
18 passing at least two no-trespassing signs, or, in the case of the City inspections, traversed multiple  
19 properties beginning at the intersection of Espola Road and Jerome Drive to the west. The RWQCB was  
20 on notice that permission was not granted for their traveling on Crocker Road to access the property, and

21  
22           <sup>4</sup> Q. Do you have any understanding whether Jerome Drive is a private street versus a public street?

23           A. I believe it is a private street. But I can't say for certain.

24           Q. How about Crocker Road?

25           A. I believe that is also a private street.

26           [Deposition of Jim Lyon at 30:5-10 (excerpt attached as I, Attachment 4)].

27           <sup>5</sup> Q. Jerome Drive is a private drive, correct?

28           A. Yes.

          Q. And so is Crocker?

          A. Yes.

          Q. And your property is halfway into Jerome Drive, right, on the north side?

          A. Halfway into Jerome Drive on the north side.

          Q. Your property line is down the center of Jerome Drive?

          A. Yeah.

          Q. Any likewise on the east it's halfway through Crocker Road?

          A. Yes.

          [Deposition of Sean Marsden at 30:1-10 (Appendix I, Attachment 5.)]

1 on notice that the Moritzes and other owners of the Road and adjacent properties expected privacy —  
2 that is the very purpose of no-trespassing signs and of private-road signs.

3 Neither RWQCB, nor the City on whose hearsay evidence RWQCB relies, had any right to be on  
4 any of the Crocker Road or the Jerome Drive properties without a warrant or without consent. RWQCB  
5 has demonstrated neither a warrant nor consent nor any lawful entitlement to be on the property from  
6 which it asserts it had a "plain view" of the Moritzes' property. This is not a case of a governmental  
7 entity viewing alleged wrongful conduct from the spot where they had a lawful entitlement to be; they  
8 had no lawful entitlement to traverse multiple pieces of private property absent a warrant, consent, or  
9 exigent circumstances. There is no evidence in the record to justify RWQCB personnel being where  
10 they were when they performed their purported "plain view" inspection.

11 Because the roads themselves are private property and are clearly marked as such — particularly  
12 in the case of Crocker Road which is marked with *two* no-trespassing signs and is accessible only from  
13 the south by passing those two signs, the Moritzes had a reasonable expectation of privacy. The  
14 Moritzes' property was fenced or was otherwise enclosed by bushes, shrubbery, trees on three sides and  
15 bounded by a neighbor's fenced property on the fourth side. As was presented at the February 11, 2009  
16 hearing, the Moritzes sought out this particular piece of property in part specifically because of the  
17 *privacy* that the area afforded. Certainly they had no expectation that governmental entities will travel  
18 the roads past no-trespassing signs, trespassing on multiple neighbors' properties, to perform inspections  
19 without notice, without exigent circumstances, and without warrants.

20 The Fourth Amendment to the Constitution of the United States provides: "The right of the  
21 people to be secure in their persons, houses, papers, and effects, against unreasonable searches and  
22 seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath  
23 or affirmation, and particularly describing the place to be searched, and the persons or things to be  
24 seized." Our state Constitution provides for similar safeguards against unreasonable searches and  
25 seizures. (Cal. Const., Art. I, § 13.) Moreover, the Moritzes have rights guaranteed by the California  
26 Constitution, Article I, Section 1, including the rights to protect their property, to obtain their safety, and  
27 to have privacy:  
28

1 "All people are by nature free and independent and have inalienable rights.  
2 Among these are enjoying and defending life and liberty, acquiring, possessing, and  
3 protecting property, and pursuing and obtaining safety, happiness, and privacy."  
California Constitution, Article I, Section 1.

4 As the United States Supreme Court has explained: "The touchstone of the Fourth  
5 Amendment is reasonableness. . . . The Fourth Amendment does not proscribe all state-initiated  
6 searches and seizures; it merely proscribes those which are unreasonable." (*Florida v. Jimeno*  
7 (1991) 500 U.S. 248, 250 [114 L.Ed.2d 297, 111 S.Ct. 1801]; see also *Brigham City, Utah v.*  
8 *Stuart* (2006) \_\_\_\_ U.S. \_\_\_\_ [164 L.Ed.2d 650, 126 S.Ct. 1943, 1947].)

9 "[P]rivate residences are places in which the individual normally expects privacy free of  
10 governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is  
11 prepared to recognize as justifiable." (*People v. Robles* (2000) 23 Cal.4th 789, 795, quoting *United*  
12 *States v. Karo* (1984) 468 U.S. 705, 714 [82 L.Ed.2d 530, 104 S.Ct. 3296].) *Searches and seizures*  
13 *conducted without a warrant consequently "are per se unreasonable under the Fourth Amendment*  
14 *[of the United States Constitution] — subject only to a few specifically established and well-delineated*  
15 *exceptions."* *Katz v. United States* (1967) 389 U.S. 347, 357 (emphasis added); see also *Payton v. New*  
16 *York* (1980) 445 U.S. 573, 586 [63 L.Ed.2d 639, 100 S.Ct. 1371].

17 Where the defendant establishes that the search or seizure was made without a warrant, and was  
18 prima facie unlawful, "the burden then rest[s] on the prosecution to show proper justification. *Horack v.*  
19 *Superior Court* (1970) 3 Cal.3d 720, 725; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 972. The  
20 fact that the government might have probable cause for their belief that items are subject to seizure does  
21 not eliminate the need for a warrant to effect a search of a residence. *Jones v. United States* (1958) 357  
22 U.S. 493, 497 [2 L.Ed.2d 1514, 78 S.Ct. 1253]. "Were federal officers free to search without a warrant  
23 merely upon probable cause to believe that certain articles were within a home, the provisions of the  
24 Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.* at  
25 p. 498.

26 As the United States Supreme Court explained over 50 years ago:

27 "The point of the Fourth Amendment . . . is not that it denies law enforcement the  
28 support of the usual inferences which reasonable men draw from evidence. Its protection  
consists in requiring that those inferences be drawn by a neutral and detached magistrate

1 instead of being judged by the officer engaged in the often competitive enterprise of  
2 ferreting out crime. Any assumption that evidence sufficient to support a magistrate's  
3 disinterested determination to issue a search warrant will justify the officers in making a  
4 search without a warrant would reduce the Amendment to a nullity and leave the people's  
5 homes secure only in the discretion of police officers. Crime, even in the privacy of one's  
6 own quarters, is, of course, of grave concern to society, and the law allows such crime to  
7 be reached on proper showing. The right of officers to thrust themselves into a home is  
8 also a grave concern, not only to the individual but to a society which chooses to dwell in  
9 reasonable security and freedom from surveillance. When the right of privacy must  
10 reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not  
11 by a policeman or Government enforcement agent." *Johnson v. United States* (1948) 333  
12 U.S. 10, 13-14 [92 L.Ed. 436, 68 S.Ct. 367], fns. omitted.

13 The reason for this presumption that warrantless searches are unreasonable (and hence illegal) is  
14 plain: "An intrusion by the state into the privacy of the home for any purpose is one of the most  
15 awesome incursions of police power into the life of the individual. . . . It is essential that the  
16 dispassionate judgment of a magistrate, an official dissociated from the 'competitive enterprise of  
17 ferreting out crime' [citation], be interposed between the state and the citizen at this critical juncture."  
18 *People v. Ramey* (1976) 16 Cal.3d 263, 275 [127 Cal.Rptr. 629].

19 The fact that obtaining a warrant might be inconvenient and that proceeding in the absence of a  
20 warrant might be more efficient does not justify a warrantless search. "[T]he inconvenience to the  
21 officers and some slight delay necessary to prepare papers and present the evidence to a magistrate . . .  
22 are never very convincing reasons . . . to bypass the constitutional requirement" of a warrant. *Johnson v.*  
23 *United States*, *supra*, 333 U.S. at p. 15; see also *Mincey v. Arizona* (1978) 437 U.S. 385, 393 [57 L.Ed.2d  
24 290, 98 S.Ct. 2408] [person's privacy rights in "home and property may not be totally sacrificed in the  
25 name of maximum simplicity in enforcement of the criminal law"]; *Coolidge, supra*, 403 U.S. at p. 481  
26 [warrant requirement is valued part of constitutional law and "not an inconvenience to be somehow  
27 'weighed' against the claims of police efficiency".)

28 Thus, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent  
circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*,  
*supra*, 445 U.S. at p. 590; see also *Johnson v. United States, supra*, 333 U.S. at pp. 14-15 [warrant  
required save in cases involving "exceptional circumstances"]; *People v. Ramey, supra*, 16 Cal.3d at p.

1 270 [warrantless searches "unreasonable per se in the absence of one of a small number of carefully  
2 circumscribed exceptions"].)

3 In California, administrative searches require an administrative warrant issued pursuant to  
4 California Code of Civil Procedure section 1822.50. *Gleaves v. Waters* (1985) 175 Cal. App. 3d 413.  
5 Absent exigent circumstances, *the need to summarily abate a public nuisance does not of itself justify*  
6 *the government's invasion of legitimate privacy interests without consent or without a warrant. Id.* at  
7 416 (emphasis added). In *Gleaves*, agricultural control officers entered plaintiff's yard in order to abate  
8 a public nuisance. The court concluded that "entries onto private property by administrative  
9 functionaries of the government, like searches pursuant to a criminal investigation, are governed by the  
10 warrant requirement of the Fourth Amendment." *Id.* at 418, citing *Camara v. Municipal Court* (1967)  
11 387 US 523.

12 Thus where there is a legitimate privacy interest in the property entered, a warrantless and  
13 nonconsensual entry is permissible only where exigent circumstances justify the intrusion. *Gleaves*, 175  
14 Cal. App. 3d at 418. The *Gleaves* court noted that depending on the circumstances, a reasonable  
15 expectation of privacy might be recognized in certain areas surrounding one's home which are protected  
16 from nonexigent warrantless intrusions by governmental officers. *Id.* at 419.

17 The essence of a search *is viewing that which was intended to be private or hidden. A search*  
18 *within the meaning of the Fourth Amendment occurs whenever one's reasonable expectation of*  
19 *privacy is violated by unreasonable governmental intrusion.* Whether the government's purpose is to  
20 abate a public nuisance or to perform a routine inspection, the privacy interests of homeowners are no  
21 less affected. *Id.*

22 A person who surrounds his backyard with a fence, shrubbery, bushes, and trees, and otherwise  
23 limits entry has demonstrated a reasonable expectation of privacy for that backyard area. *Vidaurri v.*  
24 *Superior Court* (1970) 13 Cal.App.3d 550. Here, the Moritz property is surrounded on three sides by  
25 fences, on the fourth side by an adjoining private and fenced property, by bushes, by trees, and by  
26 shrubbery. The Moritzes have taken reasonable measures to restrict viewing of their property from  
27 adjoining parcels because they have teenage daughters living on the property, as will be discussed at the  
28 hearing herein. Significantly, and as discussed above, the property is accessible only by private roads,

1 each of which is marked "PRIVATE ROAD." (Moritzes' Third Evidentiary Submittal within Appendix  
2 H, Attachment 3.) Moreover, the road by which RWQCB accessed the Moritz property — Crocker  
3 Road — was marked with two "NO TRESPASSING" signs, one of which also states "RESIDENTS  
4 (*sic.*) ACCESS ONLY NOT A CITY TRAIL." (Moritzes' Third Evidentiary Submittal within Appendix  
5 H, attachment 1.) The Moritzes have shown a reasonable expectation of privacy and an expectation that  
6 they wished to be free from governmental intrusions and warrantless searches.

7 RWQCB's position renders meaningless the Fourth Amendment to the United States  
8 Constitution, and the California Constitution, Article I, Section 13, just as the United States Supreme  
9 Court forewarned in *Jones v. United States* (1958) 357 U.S. 493, 497. If RWQCB can tromp around  
10 citizens' property with impunity in the name of clean water, of what value are the constitutionally  
11 guaranteed rights of the Fourth Amendment and of Section 13 of Article I of the California  
12 Constitution?

13 Similarly, if there is no need to procure an administrative warrant pursuant to California Code of  
14 Civil Procedure section 1822.50, of what value is that code section? RWQCB's position would relegate  
15 that code section to meaningless surplusage, contrary to principles of statutory construction.

16 RWQCB seemingly argues for a water-quality-protection exception to the Fourth Amendment of  
17 the United States Constitution. In the name of water quality, as the argument apparently goes, RWQCB  
18 need not ever obtain a warrant.

19 But the Constitution makes no such distinctions. The Constitution makes no distinctions about  
20 whether government intrusions might end up in administrative civil liability as opposed to criminal  
21 prosecution. The penalties of civil prosecution, particularly by the RWQCB with penalties that can  
22 exceed \$1000 per day, are perhaps no less onerous and no less burdensome than criminal prosecution.  
23 Even misdemeanors with minimal jail time enjoy constitutional protections. The CAO here specifically  
24 threatened misdemeanor liability. (Appendix D at paragraph 7.)

25 Should property owners whose property, life savings, and children's college funds could be lost  
26 to liens placed by governmental entities for thousands of dollars of penalties or for cost reimbursement  
27 — as RWQCB threatens here — be entitled to any less protection than a person prosecuted for growing  
28

1 a marijuana plant, or a person who might be subject to disciplinary proceedings? Again, the  
2 Constitutions of the United States and of the State of California provide no basis for such a distinction.

3 The constitutional issue is whether the governmental entry — or the viewing of that as to which  
4 one enjoys a reasonable expectation of privacy — is proper in the first instance, not on what remedy the  
5 governmental entity might later choose to pursue. The entry — or the viewing — in the first instance  
6 must meet constitutional guarantees of the Fourth Amendment, or the evidence gained should properly  
7 be excluded.

8 RWQCB argued at a February 11, 2009 hearing that the Moritzes had no reasonable expectation  
9 of privacy because members of the public could roam Crocker Road. But in fact the public had no  
10 permission to be on Crocker Road because it is marked with no trespassing signs — the very purpose of  
11 which is to *withdraw permission* from the public to be on the road, and to make clear that owners of the  
12 road intended the area to remain private and excluded from public use. Any person traveling the road  
13 was on notice that they had no lawful entitlement to be on the road, and had no permission to be there  
14 any more that a police officer could believe that they had a right to be inside somebody's home without  
15 permission.

16 Admittedly excluding the evidence in this civil action could be an issue of first impression in the  
17 State of California. But we are guided by the principles set forth Constitution of the United States and  
18 of the State of California. Absent the remedy of exclusion of the evidence obtained in this civil matter,  
19 nothing would deter RWQCB from inspecting anybody's property at any time, and anywhere in the  
20 name of water quality. Water-quality interests should not trump Constitutional guarantees to be free  
21 from governmental searches. As the United States Supreme Court has concluded, the expediency of a  
22 warrantless inspection does not justify the failure or refusal to put the evidence in front of a magistrate  
23 who can dispassionately decide whether to issue a warrant.

24 Nothing in the United States Constitution and nothing in the California Constitution suggests that  
25 people are entitled to less protection as against governmental intrusion where the government seeks civil  
26 versus criminal remedies. Neither the United States Constitution nor the California Constitution has an  
27 exception for government intrusions seeking a civil remedy versus a criminal, penal, or disciplinary  
28 remedy.

1 Just as in *Gleaves*, RWQCB here is asserting that the Moritzes created or threatened to create a  
2 nuisance. RWQCB obtained no warrant. It has no evidence in the record excusing the absence of a  
3 warrant. It can neither properly rely on hearsay<sup>6</sup>, nor did it cure the hearsay problems by calling  
4 witnesses to testify with first-hand knowledge.

5 Notably, the City is effectively RWQCB's deputy in enforcing RWQCB's NPDES permit by  
6 creating them and forcing City grading ordinances. The City of Poway thus is required to take a variety  
7 of measures pursuant to the RWQCB's order R9-2007-0001. Among other things, the City is required to  
8 have grading ordinances and erosion-control measures in place, and is subject to RWQCB liability for  
9 failures. The City of Poway has a practice, if not a requirement, of reporting stop-work notices to the  
10 RWQCB. The City of Poway and RWQCB thus are joined at the hip in enforcing ordinances pertaining  
11 to erosion control and grading as it affects or potentially affects water quality.

12 The RWQCB, and the City of Poway acting in effect as RWQCB's deputy in enforcing erosion-  
13 control measures, should have subjected themselves to the dispassionate judgment of a magistrate before  
14 having performing administrative inspections of property such as occurred here. The RWQCB did not  
15 carry its burden of demonstrating either an inspection warrant or a proper reason for not having sought  
16 and obtained an inspection warrant.

17 All evidence based on RWQCB's or on the City of Poway's warrantless searches, and all findings  
18 based exclusively on hearsay evidence should have been excluded. The CAO should be rescinded or  
19 withdrawn.

20 **B. THE MORITZES' DRY WASH IS NOT "WATERS OF THE STATE" OR "WATERS OF**  
21 **THE UNITED STATES SUBJECT TO RWQCB REGULATORY AUTHORITY**

22 The CAO asserts six violations of either the Water Code or of the San Diego RWQCB Basin  
23 Plan. (Appendix D, at findings 5, 6 and 8.) But these central findings on which the Moritzes' liability  
24 depends all are subject to the same weakness: *each of the findings requires a finding that the Moritzes*  
25 *deposited "waste" into "waters of the state" or into "waters of the United States."* But the RWQCB's  
26

27 <sup>6</sup> The Moritzes object to RWQCB's reliance on City provided evidence, which is hearsay, not within any appropriate exception. The information would be  
28 excluded at trial in civil matters and should be excluded here. As provided in California Government Code section 11513 (d) Hearsay evidence may be used  
for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would  
be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.



determination that waste (discussed in section D below) affected waters of the state or of the United States (discussed in this section, section C) is wrong, and RWQCB's determination accordingly should be rescinded or be withdrawn.

CAO finding 5, for example, asserts that the Moritzes caused or threatened to cause pollution<sup>7</sup> via the discharge of waste and sediment. (Appendix D, finding 5.) "Pollution" requires impairment of "waters of the state," unless it is "contamination," which requires either impairment of waters of the state or the equivalent effect from a disposal of "waste."

Similarly, CAO finding 6 asserts violations of Water Code sections 13260 (a)<sup>8</sup> and 13264 (a)<sup>9</sup>, in effect by discharging waste without having had an appropriate waste discharge permit. (See Appendix D, finding 6.) Both Water Code sections also depend on a finding that "waste" affected "waters of the state."

Similarly, the CAO asserts three violations of San Diego RWQCB's Basin Plan<sup>10</sup>: (1) that the Moritzes discharged **waste to waters of the state** in a manner causing or threatening to cause pollution, contamination, or nuisance as defined by water code section 13050 (Appendix D, finding 8 (1)); (2) that

---

<sup>7</sup> Water Code section 13050 provides:

As used in this division:

(k) "Contamination" means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease.

"Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

(l) (1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

<sup>8</sup> Water Code § 13260 provides:

(a) All of the following persons shall file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board:

(1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.

(2) Any person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.

(3) Any person operating, or proposing to construct, an injection well. (Emphasis added.)

<sup>9</sup> Water Code § 13264 provides:

(a) No person shall initiate any new discharge of waste or make any material changes in any discharge, or initiate a discharge to, make any material changes in a discharge to, or construct, an injection well, prior to the filing of the report required by Section 13260 and no person shall take any of these actions after filing the report but before whichever of the following occurs first:

(1) The issuance of waste discharge requirements pursuant to Section 13263.

(2) The expiration of 140 days after compliance with Section 13260 if the waste to be discharged does not create or threaten to create a condition of pollution or nuisance and any of the following applies . . . .

<sup>10</sup> The Moritzes incorporated the San Diego RWQCB's Basin Plan as part of the record by reference pursuant to 23 CCR section 648.3.

1 the Moritzes discharged **pollutants** or dredged or fill material to **waters of the United States** without an  
2 NPDES permit or a dredged or fill material permit (Appendix D, finding 8 (3); and that the Moritzes  
3 discharged sand, silt, clay or other earthen materials in quantities causing deleterious bottom deposits,  
4 turbidity, or discoloration in **waters of the state** or which unreasonably affect or threaten to affect  
5 beneficial uses of such waters.

6 Via the CAO, the Regional Board improperly is asserting regulatory authority over a dry wash  
7 dubbed an ephemeral stream<sup>11</sup>. But Moritzes testified at the February 11, 2009 hearing that water flows  
8 in their yard only approximately 3 days per year. Water does not flow in every rain event. To the  
9 contrary, water flows only in the most significant rain events.

10 Consistent with the United States Supreme Court's decision in *Rapanos v. United States* 547 U.S.  
11 714 (2006), Water Code section 13050 (e) does not and should not categorically include within the  
12 phrase "waters of the state" such dry washes or ephemeral streams in which water flows three days per  
13 year. Rules of statutory construction should not be applied so as to confer regulatory authority over all  
14 such dry land on which water falls. Doing so strains credibility, or, in the words of the United States  
15 Supreme Court, in discussing the phrase "waters of the United States," would stretch the phrase beyond  
16 parody:

17 The Corps has also asserted jurisdiction over virtually any parcel of land  
18 containing a channel or conduit—whether man-made or natural, broad or narrow,  
19 permanent or ephemeral—through which rainwater or drainage may occasionally  
20 or intermittently flow. On this view, the federally regulated "waters of the United  
21 States" include storm drains, roadside ditches, ripples of sand in the desert that  
22 may contain water once a year, and lands that are covered by floodwaters once  
23 every 100 years. Because they include the land containing storm sewers and  
24 desert washes, the statutory "waters of the United States" engulf entire cities and  
25 immense arid wastelands. In fact, the entire land area of the United States lies in  
26 some drainage basin, and an endless network of visible channels furrows the  
27 entire surface, containing water ephemerally wherever the rain falls. Any plot of  
28 land containing such a channel may potentially be regulated as a "water of the  
United States." *Id.* at 722.

25 Carried to its logical conclusion, and apparently the way that the RWQCB interprets the  
26 meaning of "waters of the state," the RWQCB has regulatory authority over any place that water  
27

28 <sup>11</sup> Again, the finding that the area is an ephemeral stream was a finding based solely on hearsay evidence, to which the Moritzes objected.

1 falls — including all dry land, all rooftops, and perhaps even cars and personal umbrellas. After  
2 all, in rain events, the water falling ends up in the watershed, so the RWQCB apparently believes  
3 it has regulatory authority. Had the California legislature intended to confer such broad  
4 regulatory authority, the legislature could have and should have done so by clearly so stating in a  
5 statute.

6 But instead, the legislature conferred regulatory jurisdiction over "waters of the state"  
7 through Water Code section 13050:

8 As used in this division:

9 . . .

10 (e) "Waters of the state" means any surface water or groundwater, including saline  
waters, within the boundaries of the state.

11 The commonsense meaning of "water" is liquid — H<sub>2</sub>O — or bodies of water like streams,  
12 ponds and lakes.<sup>12</sup> Dry washes, by contrast, are just that — dry. The Legislature could have said that  
13 "waters of the state" includes "any surface water or groundwater, *including the beds onto which or into*  
14 *which such waters occasionally or intermittently flow*, within the boundaries of the state." But the  
15 italicized words are absent from the statute, and RWQCB cannot now insert them to make the statute  
16 read as RWQCB would like. Adding words to the definition in order to make a statute clear is contrary  
17 to principles of statutory construction. The statute must be construed without the addition of words,  
18 according to the commonsense, plain meaning thereof. *People v. Nguyen* (2000) 22 Cal.4th 872, 878.  
19 Water clearly, plainly, and unambiguously means water, and does not mean dry land.

20 RWQCB staff did not personally observe water flowing on the Moritzes' property. To the  
21 contrary, RWQCB staff observed a single hearsay photograph taken without an administrative warrant  
22  
23

24 <sup>12</sup> Merriam-Webster defines "water" as: "1 a: the liquid that descends from the clouds as rain, forms streams, lakes, and seas, and is a major constituent of all  
25 living matter and that when pure is an odorless, tasteless, very slightly compressible liquid oxide of hydrogen H<sub>2</sub>O which appears bluish in thick layers,  
freezes at 0° C and boils at 100° C, has a maximum density at 4° C and a high specific heat, is feebly ionized to hydrogen and hydroxyl ions, and is a poor  
26 conductor of electricity and a good solvent b: a natural mineral water — usually used in plural 2: a particular quantity or body of water: as a (1) plural : the  
water occupying or flowing in a particular bed (2) chiefly British : lake, pond b: a quantity or depth of water adequate for some purpose (as navigation)  
27 plural (1): a band of seawater abutting on the land of a particular sovereignty and under the control of that sovereignty (2): the sea of a particular part of the  
earth d: water supply <threatened to turn off the water> 3: travel or transportation on water <we went by water> 4: the level of water at a particular state of  
the tide : tide 5: liquid containing or resembling water: as a (1): a pharmaceutical or cosmetic preparation made with water (2): a watery solution of a gaseous  
or readily volatile substance — compare ammonia water barchaic : a distilled fluid (as an essence) ; especially : a distilled alcoholic liquor c: a watery fluid  
28 (as tears, urine, or sap) formed or circulating in a living body d: amniotic fluid ; also : bag of waters 6 a: the degree of clarity and luster of a precious stone b:  
degree of excellence <a scholar of the first water> 7: watercolor 8 a: stock not representing assets of the issuing company and not backed by earning power b:  
fictitious or exaggerated asset entries that give a stock an unrealistic book value."

1 several years before the Moritzes owned the property showing a trickle of water on property that might  
2 or might not be the Moritzes' property.

3 There is no evidence in the record that the United States is asserting, would assert, or could  
4 assert jurisdiction over the Moritzes' property. This is particularly so in light of the *Rapanos* decision.

5 Restricting the meaning "waters of the state" to *water* comports with the commonsense meaning  
6 of the term "water." The Moritzes do not have a stream flowing on their property; they have a natural  
7 depression of the land on which water occasionally falls.

8 The plurality decision of the United States Supreme Court recognized analogously that  
9 restricting the meaning "waters of the United States" to exclude ephemeral streams comports with the  
10 commonsense, plain meaning of the term "water:"

11 The restriction of "the waters of the United States" to **exclude channels containing merely**  
12 **intermittent or ephemeral flow also accords with the commonsense understanding of the**  
13 **term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and**  
14 **culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches,**  
15 **and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the**  
16 **United States" beyond parody.** The plain language of the statute simply does not authorize this  
17 "Land Is Waters" approach to federal jurisdiction. *Id.*, at 733-34.

18 The United States Supreme Court refused to allow the Army Corps of Engineers to assert  
19 jurisdiction in similar circumstances. The SWRCB likewise ought to restrict the reach of RWQCB's  
20 jurisdiction by not adopting the land-is-waters-of-the-state approach that RWQCB takes in issuing the  
21 CAO. There is no evidence that the Moritzes adversely affected waters of the State or of the United  
22 States. Absent a finding that "waters of the state" or "waters of the United States" are affected, each of  
23 the findings set forth in the CAO is erroneous.

24 **C. THE MORITZES' USEFUL FILL AND PIPE ARE NOT "WASTE"**  
25 **WITHIN THE MEANING OF WATER CODE SECTION 13050 (D):**

26 As noted, the CAO depends on findings that the Moritzes' "waste" affected "waters of the state"  
27 or of the United States. The Moritzes attempted to protect their property from adverse effects of rare  
28 storm water and sediment by importing fill and by installing a 24-inch diameter pipe intended to  
harmlessly convey water collected from one side of the property to the other, without affecting the  
quality of the water in any way whatsoever.

1 Water Code section 13050 (d) includes neither by definition nor by categorical example the  
2 usable and useful fill material or pipe that here was specifically intended to protect Petitioners' property  
3 from unconstrained City of Poway storm waters:

4 As used in this division:

5 . . .  
6 (d) "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or  
7 radioactive, associated with human habitation, or of human or animal origin, or from any  
8 producing, manufacturing, or processing operation, including waste placed within containers of  
9 whatever nature prior to, and for purposes of, disposal.

10 Certainly definition of "waste" is not a model of clarity. First, the statute does not necessarily  
11 define the properties of waste; it defines what waste "includes," then uses the term to be defined within  
12 the definition, creating logical circularity. The definition then identifies a number of different  
13 categories, none of which appear to include useful, usable fill and pipes. Finally, the definition has a  
14 subjunctive clause "and for the purposes of, disposal" but the definition is written in such a way as we  
15 are left to wonder whether the subjunctive clause and the word "and" requires the intent to dispose of the  
16 particular material.

17 The commonsense, plain meaning of the term "waste" as used in the statute<sup>13</sup> is a material that is  
18 no longer useful, is an unwanted byproduct, and thus is subject to being discarded and disused used  
19 because of its lack of utility. *Waste is something that people do not want*, not something like useful,  
20 usable fill and pipes intended to protect one's property. Moreover, the fill and pipes were not placed  
21 "for the purposes of disposal."

22 There is no evidence in the record that the fill or the pipe was placed for the purposes of disposal,  
23 or that either were useless discards or byproducts. There is no evidence in the record that the material  
24 placed was toxic or harmful.<sup>14</sup>

25 <sup>13</sup> Merriam-Webster defines "waste" as follows: "damaged, defective, or superfluous material produced by a manufacturing process: as (1): material rejected  
26 during a textile manufacturing process and used usually for wiping away dirt and oil <cotton waste> (2): scrap (3): an unwanted by-product of a  
27 manufacturing process, chemical laboratory, or nuclear reactor <toxic waste> <hazardous waste> <nuclear waste> b: refuse from places of human or animal  
28 habitation: as (1): garbage, rubbish (2): excrement —often used in plural (3): sewage c: material derived by mechanical and chemical weathering of the  
land and moved down sloping surfaces or carried by streams to the sea."

<sup>14</sup> RWQCB staff person, Christopher Means, testified in deposition (Appendix E, Exhibit 20 at page 105:1-14) as follows:

Q Okay. And how about the threat to the public health, including the degree of toxicity of the discharge? What evidence does it have in  
those regards? Same thing?

A In the case of discharge fill to a stream, I have no evidence -- I do not know where Dr. Moritz got his fill from, so I don't know whether or  
not it's toxic fill or not. I have no way to know that.

Q No evidence as you sit here today, correct?

1 Had the legislature intended to include useful, usable fill material or storm-water pipes within the  
2 definition of "waste," it could have and should have done so either specifically with appropriate  
3 definitional language, or by including such fill or pipes within one of the categorical examples used to  
4 exemplify the meaning of the term "waste," within the Water Code. But the legislature did not. Useful,  
5 usable fill and pipes are not like the categories of examples set forth in the code: "other waste  
6 substances, liquid, solid, gaseous, or radioactive, associated with human habitation.

7 CAO findings 5, 6, and 8 (1) each depend on a finding that the Moritzes discharged or deposited  
8 "waste." The RWQCB acted improperly in issuing a CAO based on those findings because there is no  
9 "waste" within the meaning of the statute. As set forth in section C, *supra*, Water Code section 13304  
10 on which RWQCB's likewise requires a finding of a deposit of "waste." Absent a finding that the  
11 Moritzes deposited "waste" within the meaning of Water Code section 13050 (d), issuance of the CAO  
12 is improper and should be rescinded or withdrawn.

13 **D. ABSENT A DISCHARGE OF "WASTE" INTO "WATERS OF THE STATE," THERE IS**  
14 **NO NEED FOR WDRS AND NO VIOLATION OF WATER CODE §§ 13260 AND 13264:**

15 Water Code sections 13260<sup>15</sup> and 13264<sup>16</sup> recognize that some waste discharges are permissible,  
16 provided that the waste discharger has given notice of the intended discharge, has obtained permission  
17 for the discharge, and has not exceeded the scope of the permission. The CAO finds that the Moritzes  
18 violated those two statutes by discharging waste without a report of waste discharge. (Appendix D at  
19 findings 6 and 7.)

20 A violation of Water Code section 13260 requires a discharge of *waste* that could affect *waters*  
21 *of the state*. Likewise, liability under Water Code 13264, for failure to file a report about a waste  
22  
23

24 A I have no idea of there being a toxicity threat from his discharge, other than the potential of sediment to be discharged into the  
neighboring streams and to detrimentally affect organisms living in that stream by smothering them.

25 <sup>15</sup> Water Code section 13260, in part, provides:

26 (a) All of the following persons shall file with the appropriate regional board a report of the discharge, containing the information which may be  
required by the regional board:  
27 (1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state,  
other than into a community sewer system.

28 <sup>16</sup> Water Code section 13260, in part, provides:

(a) No person shall initiate any new discharge of waste or make any material changes in any discharge, or initiate a discharge to, make any  
material changes in a discharge to, or construct, an injection well, prior to the filing of the report required by Section 13260 . . . .

1 discharge, by its own terms requires *waste*, and references and relates back to Water Code section  
2 13260, which requires both *waste* and impact to *waters of the state*.

3 As set forth above, the Moritzes' useful fill and pipe is not "waste" within the meaning of Water  
4 Code section 13050 (d). Additionally, the Moritzes' backyard on which water flows roughly 3 days  
5 annually is not "waters of the state" within the meaning of Water Code section 13050 (e). The CAO  
6 accordingly is improper and should be rescinded, withdrawn or dismissed.

7 **E. ABSENT A DISCHARGE OF "WASTE" INTO "WATERS OF THE STATE,"**  
8 **THERE IS NO VIOLATION OF THE BASIN PLAN:**

9 The CAO set forth three violations of the Basin Plan<sup>17</sup> at finding 8 of the CAO. (Appendix D,  
10 finding 8. The CAO states:

11 The unauthorized discharge of **waste** by Dr. Moritz is in violation of the waste  
12 discharge prohibitions contained in the Water Quality Control Plan for the San Diego  
Basin (Basin Plan):

13 1. The discharge of **waste** to **waters of the state** in a manner causing, or threatening  
14 to cause a condition of **pollution, contamination or nuisance** as defined in CWC section  
13050 , is prohibited;

15 3. The discharge of pollutants or dredged or fill material to **waters of the United**  
16 **States** except as authorized by an NPDES permit or a dredged or fill material permit  
(subject to the exemption described in California Water Code section 13376) is  
prohibited; and

17 14. The discharge of sand, silt, clay or other earthen materials from any activity,  
18 including land grading and construction, in quantities which cause deleterious bottom  
19 deposits, turbidity or discoloration **in waters of the state** or which unreasonably affect,  
or threaten to affect, beneficial uses of **such waters** is prohibited. (Appendix D, finding  
8, emphasis added.)

20 Again, the linchpins of liability on the CAO depend on a determination that the Moritzes' useful,  
21 usable fill intended to protect their property from occasional storm waters is a "waste" within the  
22 meaning of Water Code section 13050 (d), and on a determination that the Moritzes' yard on which  
23 water falls and on which water flows approximately 3 days per year is "waters of the state" or "waters of  
24 the United States." As set forth above, this case does not involve waste, nor does it involve waters of the  
25 state or the United States. Accordingly the Moritzes have not violated the Basin Plan. The CAO should  
26 be rescinded, withdrawn or dismissed.

27  
28 <sup>17</sup> The Basin plan was made as part of the record below by reference pursuant to 23CCR section 648.3.

1 **F. ABSENT A DISCHARGE OR DEPOSIT OF "WASTE" INTO "WATERS OF THE STATE"**  
2 **THERE IS NO POLLUTION, CONTAMINATION, OR NUISANCE OR THREAT THAT**  
3 **CAN JUSTIFY ISSUANCE OF A CLEANUP AND ABATEMENT ORDER PURSUANT TO**  
4 **WATER CODE SECTION 13304, MAKING ISSUANCE OF THE CAO IMPROPER:**

5 The statute that enables the RWQCB's issuance of the CAO requires a finding of waste affecting  
6 waters of the state. (See Water Code section 13304<sup>18</sup>.) For the CAO issued under the auspices of Water  
7 Code 13304 to be proper, RWQCB must have found a discharge of *waste* into *waters of the state*. But  
8 here there is no waste involved, no waters of the state involved, no evidence of pollution, no evidence of  
9 contamination, and no evidence of nuisance.

10 The RWQCB did not test water quality upgradient of the site to allow comparison to water  
11 exiting the Moritzes property downgradient of the site. It has no evidence that the Moritzes' property  
12 did anything to affect water quality. Instead, the Moritzes' property's possible effect on water quality is  
13 pure speculation, pure conclusory allegations without any basis in fact or in evidence.

14 The evidence actually is to the contrary — the Moritzes' property did nothing to affect water  
15 quality in any way. The only evidence on the condition of water quality entering onto or exiting from  
16 the Moritzes' property are photographs during a significant rainstorm. (Appendix E, at Exhibit 18.) The  
17 photographs show portions of a "plastic creek" on the Moritzes' property that the City of Poway installed  
18 for sedimentation control. The "plastic creek" is located on only the Moritzes' property, and during the  
19 significant December 18, 2008 rain event conveyed water from one side of the Moritzes' property to the  
20 other. Clearly the quality of the water flowing onto the "plastic creek" and thus onto the Moritzes'  
21 property is bad — it has a high sediment load.

22 But there is no evidence of the condition or quality of the water downstream as it exits the  
23 property, nor did RWQCB ever inspect it or test it. The RWQCB has no evidence that the Moritzes'  
24 property adversely affected water quality. There is no evidence that the Moritzes' conduct created a  
25 condition of pollution, or a condition of nuisance. The CAO was improperly issued on the basis of  
26 Water Code section 13304 and accordingly should be rescinded or withdrawn.

27 <sup>18</sup> Water Code section 13304 states, in part: (a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste  
28 discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or  
threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or  
threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the  
case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.



1 As used in section 13304, **threaten** means a condition creating a “*substantial probability of*  
2 *harm*, when the probability and potential extent of harm make it necessary to take *immediate action* to  
3 prevent, reduce, or mitigate damage to persons, property, or natural resources.” Water Code sec.  
4 13304(e) (Emphasis added).

5 **Pollution** means an alteration of the quality of the waters of the state by waste, to a degree that  
6 unreasonably affects such waters for beneficial uses, or facilities that serve such beneficial uses. Water  
7 Code sec. 13050(l).

8 A **nuisance** is anything that

- 9 (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the  
10 free use of property, so as to interfere with the comfortable enjoyment of life or  
11 property;  
12 (2) affects at the same time an entire community or neighborhood, or any considerable  
13 number of persons, although the extent of that impact may be unequal; and  
14 (3) occurs during or as a result of the treatment or disposal of waste.  
15 (Water Code sec. 13050(m)).

16 The record is devoid of any evidence concerning how any discharge or deposit of waste has  
17 occurred *from* the Moritz property. Dr. Moritz performed repairs to his yard which is dry except for  
18 when it rains. Even when it rains, there is no flow of water except for the most significant rains, which  
19 occur approximately 3 days per year. To date there has been no release, no conveyance, nor any  
20 evidence of silt, waste or erosion based on any admissible evidence. *See e.g., Lake Madrone Water*  
21 *Dist. v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163, 169-170 (finding release of  
22 sediment from Lake Madrone constitutes waste under Water Code sec. 13050, subd. (d) *when* released  
23 through the gate valve of the Lake Madrone dam). The Water Code requires at least some indicia of  
24 harm before the Regional Board’s regulation is proper.

25 Prior to Dr. Moritz’ restoration work, erosion and sedimentation caused by poor upstream storm  
26 water management by the City of Poway and/or other property owners resulted in the creation of gullies,  
27 scours and ruts through Dr. Moritz’ property. Fire trucks were not able to cross the ephemeral stream  
28 bed during the October 2007 Witch Creek Fire, thereby exacerbating the threat to Dr. Moritz’ residence  
and nearby properties.

1 Dr. Moritz began repairs to his yard and installed the underground pipe and siltation drainage  
2 basin system during the dry season in San Diego County (February to July 2008). The RWQCB has  
3 neither witnessed accelerated storm water nor sediment exiting the drainage system, nor has it tested  
4 water to determine whether the Moritzes' creates a *substantial* probability of harm to waters of the state  
5 that would justify regulation under Water Code section 13304(a).

6 There is an absence of any evidence in the record demonstrating substantial harm to anybody, to  
7 any interested persons, and to the public. RWQCB has no evidence that there is any damage to water  
8 quality. RWQCB staff person, Christopher Means, testified during deposition as follows:

9 Q Do you know whether the regional board has ever done any inspection or test by  
10 which it could determine the quality of the water as it enters onto Bill Moritz's  
property during a rain event?

11 A I don't know.

12 Q How about as it -- as water comes off of the property? Has the regional board ever  
done any inspection or test to determine the quality of water as it exits the Moritz  
property?

13 A Only that I have seen pictures of the property by the city of Poway putting in their  
14 interim BMPs. I have seen it during a rain event, a picture of it.

15 Q What did you conclude based upon the picture?

16 A That water was going across his property, there was some sediment in it from  
upstream.

17 Q Did you make any determination whether the water quality was degraded as it exited  
his property?

18 A I don't have enough information to make that determination.

19 Q Because you don't have any inspection or tests, right?

20 A To my knowledge, there -- I have conducted no tests or investigations as to  
constituents contained in storm water crossing Dr. Moritz's property.

21 Q Do you believe that the Moritz property, as it existed in August 2008, threatened to  
degrade water quality?

22 A I don't know. (Deposition of Christopher Means at Appendix E., exhibit 20, page  
64:19-65:24.)

23 Similarly, when asked about the threat to public health, RWQCB staff person, Christopher  
24 Means, testified that he has no evidence of any toxicity that might threaten public health, although he  
25 raised a concern about organisms in the stream (which flows but three days per year):

26 Q Okay. And how about the threat to the public health, including the degree of  
toxicity of the discharge? What evidence does it have in those regards? Same thing?

27 A In the case of discharge fill to a stream, I have no evidence -- I do not know where  
28 Dr. Moritz got his fill from, so I don't know whether or not it's toxic fill or not. I  
have no way to know that.

1 Q No evidence as you sit here today, correct?

2 A I have no idea of there being a toxicity threat from his discharge, other than the  
3 potential of sediment to be discharged into the neighboring streams and to  
4 detrimentally affect organisms living in that stream by smothering them.  
(Deposition of Christopher Means at Appendix E, Exhibit 20 at page 105:1-14.)

5 But RWQCB staff, Christopher Means rightly candidly admitted that even the harm to unknown,  
6 unseen organisms was speculative at best, which is far from the standard that threats under Water Code  
7 section 13304<sup>19</sup> are required to meet:

8 Q Any idea of any species that were ever there?

9 A Of aquatic species?

10 Q Yes.

11 A No.

12 Q That's just speculation?

13 A It's more of a general observation about effects of the discharge of waste on water  
14 bodies.

15 Q Not based on this particular instance, correct?

16 A The stream -- the ephemeral stream is given beneficial uses through our basin plan  
17 of warm -- which -- how do I say this. There's the *potential that there could be aquatic*  
18 *species in there* at the time that water is flowing through the stream and that it could help  
19 move these down to a more permanent -- not permanent, but a larger stream. *There's the*  
20 *possibility that aquatic species can travel* through the ephemeral stream.

21 Q So it's speculative here, but based on experience at other ephemeral streams?

22 A *It's speculative here* because *I don't know except from photographs*<sup>20</sup> what the  
23 stream looked like prior to Dr. Moritz's activities.

24 The site is not likely to cause harm to anybody at any point in the reasonably foreseeable future  
25 because it is *stabilized*, and BMPs are preventing erosion in discharge of sediment off-site. RWQCB's  
26 staff person, Christopher Means, admitted that the site currently is stabilized:

27 Q Do you know today whether the site is stabilized as far as erosion control and  
28 sediment control is concerned?

A From the photographs I've seen of the abatement work that was performed by the city  
of Poway, so far to date those BMPs seem to be preventing erosion and discharge of  
sediment off-site from your client's property. (Deposition of Christopher Means at  
Appendix E, Exhibit 20 at page 88:1-8.)

<sup>19</sup> Water Code section 13304 (e) is the source of authority for issuance of the CAO, but requires more than mere possibility of harm. That code subsection states: "*Threaten*," for purposes of this section, *means a condition creating a substantial probability of harm*, when the probability and potential extent of harm make it reasonably necessary to take *immediate* action to prevent, reduce, or mitigate damages to persons, property, or natural resources. (Emphasis added).

<sup>20</sup> The photographs are hearsay, to which Petitioners timely objected. (See Appendix H.) The *sole* basis for the finding that there is a potential of harm to aquatic species is hearsay evidence, which is *not* sufficient to support the finding of harm, per Government Code section 11513.

1  
2  
3 Because the site is stabilized, there is no *immediate need* for action to prevent harm or damages.  
4 The CAO imposes costly compliance measures on Petitioners without evidence of a *substantial*  
5 *probability of harm* to others, to waters, to beneficial uses, or even to organisms. Such harms are  
6 speculative, and are based on hearsay evidence to which Petitioners timely objected per Government  
7 Code section 11513. The possibility of harm or the potential of damages is not enough to establish  
8 Water Code section 13304 liability.

9 Although the RWQCB does not have evidence of a "substantial probability of harm," the  
10 Moritzes have attempted to mitigate the effect and the threat of flooding, scours, sediment transport  
11 from upgradient sources. The CAO should be rescinded, withdrawn, or dismissed.

12 **G. EVEN IF THE CAO WERE OTHERWISE PROPER, RWQCB VIOLATES WATER CODE**  
13 **§ 13360 BY SPECIFYING THE SPECIFIC DESIGN OR METHOD OF COMPLIANCE:**

14 Regional Board staff admitted that the point of the CAO is to specify the design — to return the  
15 stream to an earlier condition as the only allowable method of compliance — thus precluding alternate  
16 means of achieving water quality objectives and compliance. But doing so violates Water Code section  
17 13360. The CAO should be rescinded, withdrawn, dismissed or modified.

18 RWQCB staff person, Christopher Means, testified in deposition as follows:

19 Q In other words, part of the RWQCB, if adopts this, is telling the Moritzes how to  
20 restore the stream by specifying the design. And that design is the preexisting condition,  
21 right?

22 A Not exactly, no.

23 Q How does it differ?

24 A We are requesting that the stream be restored, and then elements of the restoration  
25 that are necessary to have that happen, to have the stream restored to its pre-project  
26 configuration are here. How that's to be done -- we're not prescribing how it's to be done.  
27 We're prescribing what's required to restore the creek.

28 Q When you're saying you're not prescribing how it's to be done, you mean that he can  
use bulldozers versus shovels? That's his choice? What do you mean?

A I mean, yes, the way he goes about it is up to him.

Q But the design must be the same design as it existed before he did any work, correct?

A That's the point, yes.

Water Code section 13360 prohibits the RWQCB from specifying the design or manner of  
compliance. That Water Code section states:

1 (a) No waste discharge requirement or other order of a regional board or the state board  
2 or decree of a court issued under this division shall specify the design, location, type of  
3 construction, or particular manner in which compliance may be had with that  
4 requirement, order, or decree, and the person so ordered shall be permitted to comply  
5 with the order in any lawful manner.

6 Water Code section 13360 is designed as a shield to preserve the freedom of persons who are  
7 subject to a discharge standard to elect between available strategies to comply with that standard.  
8 *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421,  
9 1438. The RWQCB asserts that cleanup and abatement of the site is necessary to prevent "unauthorized  
10 discharge of waste" and "conditions of pollution." (Appendix D, at finding 14.) But the only permitted  
11 method of compliance is set forth in order number 3, which requires (a) removal of the "waste"  
12 discharged to "waters of the state," (b) restoring the elevations of the stream channel bottom and banks  
13 to pre-discharge conditions, (c) realigning the stream channel to its pre-discharge location, (d)  
14 regurgitating the restored stream with native vegetation, and (e) removing the 24-inch drainage pipe. In  
15 other words, the CAO is exacting and demanding that there can be but one method of compliance, but  
16 one design, but one location: exactly and only that which existed previously.

17 But the Moritzes placed materials to protect themselves and their property from discharges  
18 coming from the City of Poway, discharges that the City of Poway failed to control. To the extent that  
19 the Moritzes have discharged "waste" into "waters of the state," they ought to be able, under the  
20 authority of Water Code section 13360, to show alternate means of compliance, other ways of  
21 preventing alleged pollution and alleged nuisance that might give them the relief that they seek from  
22 storm-water damage. The Moritzes ought to be given the opportunity under the authority of Water Code  
23 section 13360 to show other means of compliance. As drafted, the CAO provides absolutely no latitude,  
24 no alternate means of compliance, and consequently violates Water Code section 13360. The CAO  
25 should be rescinded, withdrawn, dismissed or modified.

26 ////

27 ////

1 **H. THE REGIONAL BOARD IMPROPERLY ISSUED THE CAO NOTWITHSTANDING THE**  
2 **ABSENCE OF ANY EVIDENCE OF DEGRADATION OF WATER QUALITY:**

3 Isn't the point of the water board to protect water quality? Should an RWQCB issue a CAO  
4 when there is no "threat" within the meaning of the Water Code, and no evidence of Water Quality  
5 degradation? Should a water board sacrifice the financial existence of a family in the name of  
6 organisms called beneficial uses, organisms that have never been seen, and the existence of which is  
7 pure speculation?

8 RWQCB's Basin Plan<sup>21</sup> precludes the discharge of sand, silt, clay or earthen materials "in  
9 quantities which caused deleterious bottom deposits, turbidity or discoloration in waters of the state or  
10 which unreasonably affect, or threaten to affect, beneficial uses of such waters . . . ." (See Appendix D at  
11 finding 8 (14).) But RWQCB does not have evidence that the Moritzes' conduct adversely affected  
12 water quality:

13 Q Do you know what the quality of water is, storm water is, as it enters onto Bill  
14 Moritz's property in a rain event?

15 A No.

16 Q Never measured it?

17 A No, I have not.

18 Q Do you know whether the regional board has ever done any inspection or test by  
19 which it could determine the quality of the water as it enters onto Bill Moritz's property  
20 during a rain event?

21 A I don't know.

22 Q How about as it -- as water comes off of the property? Has the regional board ever  
23 done any inspection or test to determine the quality of water as it exits the Moritz  
24 property?

25 A Only that I have seen pictures of the property by the city of Poway putting in their  
26 interim BMPs. I have seen it during a rain event, a picture of it.

27 Q What did you conclude based upon the picture?

28 A That water was going across his property, there was some sediment in it from  
upstream.

Q Did you make any determination whether the water quality was degraded as it exited  
his property?

A I don't have enough information to make that determination.

Q Because you don't have any inspection or tests, right?

A To my knowledge, there -- I have conducted no tests or investigations as to  
constituents contained in storm water crossing Dr. Moritz's property.

<sup>21</sup> Incorporated into the record before the RWQCB by reference pursuant to 23 CCR section 648.3.

1 Q Do you believe that the Moritz property, as it existed in August 2008, threatened to  
2 degrade water quality?

3 A I don't know.

(Deposition of Christopher Means, Appendix E, Exhibit 20 at 64:19-66:3).

4 Not only is there an absence of record evidence of the degradation of water quality, but there is  
5 no evidence of any toxicity of alleged waste materials. (See footnote 14, *supra*.) The Legislature  
6 intends that the SWRCB and the RWQCB be the primary entities responsible for coordination and  
7 control of *water* quality, and that through their regulation they attain the highest water quality *that is*  
8 *reasonable*. Water Code sections 13000 and 13001. The California legislature empowers regional  
9 boards to establish water quality objectives in their water quality control plans that will ensure *the*  
10 *reasonable protection* of beneficial uses and the prevention of nuisance. By contrast, *waste* itself is  
11 properly regulated under the Public Resources Code by the Integrated Waste Management Board,  
12 pursuant to Public Resources Code sections 40000-40511.

13 Importantly, the California legislature recognizes that there can be *some* adverse affect on water  
14 quality *without* creating liability: "[i]t is recognized that it may be possible for the water quality to be  
15 changed to some degree without unreasonably affecting beneficial uses." California Water Code section  
16 13241. But the ability to adversely affect water quality without triggering liability is arguably  
17 something of which the RWQCB staff is unaware.

18 Q Now, it's acceptable, is it not, for individuals to change the quality of water to some  
19 degree even though it might affect beneficial uses?

20 MR. LEON: Calls for a legal conclusion to some extent. It's argumentative and  
perhaps asks the witness to speculate.

21 THE WITNESS: Could you repeat the question, please?

BY MR. SIMPSON:

22 Q It's possible for people such as Dr. Moritz to change the quality of water without  
unreasonably affecting beneficial uses, right?

23 A I don't understand the question.

(Appendix E at Exhibit 20, 64:6-18.)

24 In issuing the CAO here, the RWQCB has essentially concluded — in the absence of any  
25 evidence of the degradation of water quality — that *any* conjectural, speculative degradation of water  
26 quality is *impermissible*. Here the RWQCB here has *no* evidence of background or of upgradient water  
27 quality conditions, and *no* evidence of any impacts by the site on downgradient water quality conditions.  
28

1 Automatically finding liability based on conjectural, speculative water-quality degradation directly  
2 contradicts Water Code section 13241, which specifically recognizes that *some* degradation of water  
3 quality can occur *without* unreasonably affecting beneficial uses. The CAO should be rescinded,  
4 withdrawn, or dismissed.

5 **I. THE REGIONAL BOARD FAILED TO HONOR GOV. SCHWARZENEGGER'S**  
6 **EMERGENCY SUSPENSION OF STATUTES, RULES, AND REGULATIONS:**

7 Immediately following the Witch Creek fires, Gov. Schwarzenegger issued Executive Order S-  
8 13-07. (See Appendix E at Exhibit 2.) The governor is entitled to suspend statutes and regulations by  
9 the Emergency Services Act as codified in Government Code section 8571<sup>22</sup> and elsewhere. In the fall  
10 of 2007, the governor ordered the suspension of all statutes, rules, regulations and requirements relating  
11 to hazardous and nonhazardous debris, and to restoration necessitated by the Witch Creek fires:

12 13. Statutes, rules, regulations and requirements are hereby suspended to the extent  
13 they apply to the following activities: (a) removal , storage, transportation and disposal of  
14 hazardous and nonhazardous debris resulting from the disaster, (b) necessary restoration  
15 and (c) related activities. Such statutes, rules, regulations and requirements are  
16 suspended only to the extent necessary for expediting the removal and cleanup of debris  
17 from the disaster, and for implementing *any* restoration plan. . . . ***This order shall apply***  
18 ***to***, but is not necessarily limited to, solid waste facility permits, and **waste discharge**  
19 **requirements** for storage, disposal, emergency timber harvesting, **stream environment**  
20 **zones**, emergency construction activities, along with **waste discharge requirements**  
21 **and/or Water Quality Certification for discharges of fill material or pollutants**. . . .  
[T]he boards, departments and offices within the California Environmental Protection  
Agency shall expedite the granting of other authorizations, waivers or permits necessary  
for the removal, storage, transportation and disposal of hazardous and non-hazardous  
debris resulting from the fires, and for other actions necessary for the protection of public  
health and the environment. (Executive Order S.-13-07 attached as Appendix E, Exhibit  
2, at paragraph 13 (emphasis added).)

22 Notwithstanding the unconditional language of Gov. Schwarzenegger's Executive Order S-13-07  
23 ("statutes . . . are hereby suspended"), the RWQCB adopted order R9-2007-0211, which imposed  
24 multiple conditions on the governor's unconditional suspension. (Appendix E at Exhibit 3.) But the  
25 RWQCB states in its order "this conditional waiver is consistent with the purposes of the Governor's  
26 Executive Order, S-13-07.

27  
28 <sup>22</sup> During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct  
of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code,



1 But clearly the RWQCB conditional order is *not* consistent with the governor's unconditional  
2 order; the RWQCB conditional order contradicts the governor's Executive Order by imposing multiple  
3 conditions effectively depriving the Moritzes of compliance.

4 For example, finding number 11 of the RWQCB order R9-2007-0211, suggests that Water Code  
5 section 13269 has provisions permitting temporary waivers from waste discharge requirements. But  
6 adopting an order to simply restate what the Water Code already provides is *not* compliance with the  
7 governor's Executive Order that *suspends* those very same Water Code provisions — the RWQCB order  
8 simply *restates* the purportedly suspended Water Code provisions, paying no heed to the governor's  
9 mandatory directive. The RWQCB thus provided alleged dischargers such as the Moritzes no relief  
10 from existing water code provisions, contrary to the governor's Executive Order, and contrary to the  
11 governor's clear intent:

12 Q Was there a time after the Witch Creek fires that the requirements for obtaining WDRs  
13 were suspended?

14 A Not exactly.

15 Q What do you mean by "not exactly"?

16 A I know that the regional board, after the Witch Creek fires, issued *conditional* waivers for  
17 fire related activities that may result in a discharge to isolated waters of the state, not  
18 under the jurisdiction of the federal government.  
(Deposition of Christopher Means, Appendix E, Exhibit 20 at 95:17-25 (emphasis  
19 added).)

20 Q Is it your understanding that paragraph 13 is the paragraph by which the governor  
21 suspended requirements for such things as WDRs?

22 A I don't know.

23 (Deposition of Christopher Means, Appendix E, Exhibit 20 at 96:13-16.)

24 The governor's Executive Order *does not* require prior notice to any Regional Board; yet  
25 RWQCB order R9-2007-0211 *demand*s such notice, without which people such as the Moritzes are  
26 subject to liability. The governor's Executive Order does not require satisfaction of conditions; it  
27 suspends statutes, regulations, and orders.

28 The suspension of rules and regulations that the governor unconditionally granted by order in a  
few words or sentences the RWQCB took away in six pages of multi-layered conditions set forth in its  
order R9-2007-0211. (Appendix E at Exhibit 3, pages 5-11.) The RWQCB order R9-2007-0211

*where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay*

1 repeatedly admits that it is a *conditional* order requiring a variety of "general, monitoring and  
2 notification conditions" and "mitigation conditions." (Appendix E at Exhibit 3 at pages 5-9 and 9-11.)

3 Although the RWQCB was aware that the Moritzes' conduct was in response to the Witch Creek  
4 fires, it never discussed the governor's suspension of WDR requirements that could have authorized his  
5 repair work.

6 Q Dr. Moritz told you, didn't he, that after the Witch Creek fires there was a deluge of water  
7 that came down from a dam that broke or was taken down upgradient?

8 A Yes.

9 Q And he told you that trash and sediment and debris ended up on his property?

10 A No.

11 Q Did he tell you that because of the winter rains following the Witch Creek fires that he  
12 had sedimentation and also scouring on his property and deep gullies and erosion rills  
13 [sic. — rills] on his property?

14 A Yes.

(Deposition of Christopher Means at Appendix E, Exhibit 20, page 100:6-18.)

15 Q Did you ever talk with Bill Moritz about the possibility of his property not having WDRs  
16 issued because his property might qualify for the temporary allowance to not have  
17 WDRs?

18 A No.

(Deposition of Christopher Means at Appendix E, Exhibit 20, page 98:5-9).

19 The Moritzes' conduct could have and should have qualified for the governor's categorical  
20 exemption or suspension from statutes and regulations because of the scours and sedimentation that the  
21 Moritzes' property suffered immediately following the Witch Creek fires. The City of Poway's  
22 uncontrolled storm water caused sedimentation and scours on the Moritzes' property. The Moritzes'  
23 property was at the edge of the fire line (Appendix E at Exhibit 1), and squarely within the ambit of the  
24 governor's Executive Order. The CAO was improper because it failed to take into account and to give  
25 effect to the governor's Executive Order.

26 **J. RWQCB VIOLATED 23 CCR § 2907 AND WATER CODE § 13241**  
27 **BY FAILING TO TAKE INTO ACCOUNT THE DISCHARGERS'**  
28 **RESOURCES AND ECONOMIC CONSIDERATIONS:**

Water Code section 13241 *requires* that the Regional Board take into account economic  
considerations in establishing water quality objectives. "Water quality objectives" means the limits or

*the mitigation of the effects of the emergency.* (Emphasis added.)

1 levels of water quality constituents or characteristics which are established for the *reasonable* protection  
2 of beneficial uses of water or the prevention of nuisance within a specific area. Water Code section  
3 13050 (h) (emphasis added). As set forth in section H, *supra*, the RWQCB never tested upgradient or  
4 downgradient water, and accordingly does not have any evidence that the Moritzes' conduct adversely  
5 affected water quality.

6 The CAO asserts in finding 8 (14) that the Moritzes' discharge causes deleterious bottom  
7 deposits, turbidity, or discoloration of waters of the state that unreasonably affects or threatens to affect  
8 *beneficial uses*. But water code 13241 and 13050 require that water quality objectives be reasonable and  
9 that the water quality objectives set for a specific area take into account economic considerations.

10 The United States in general and California in specific are suffering from the worst economy in  
11 almost a century. Although the Moritzes raised the argument before the RWQCB that the RWQCB had  
12 failed to take into account economic considerations in setting water quality objectives, the RWQCB  
13 never produced one shred of evidence that it ever considered any economic considerations in setting its  
14 water quality objectives for the specific watershed within which the Moritzes' home lies. There is no  
15 evidence set forth in the basin plan that the RWQCB took into account economic considerations.  
16 Absent evidence of RWQCB taking into account economic considerations, the CAO has applied to the  
17 Moritzes violates Water Code section 13241 and should be withdrawn, rescinded or dismissed.

18 Similarly, according to the RWQCB's own standard — in its own Basin Plan — RWQCB  
19 promises the public that it will consider "financial resources of the discharger" in selecting appropriate  
20 enforcement action. (Appendix E at Exhibit 16.) According to its own rule of law, it should have  
21 considered the dischargers' resources.

22 Q Do you have any information about the financial ability of the Moritzes?

23 A I do not.

24 Q Does anybody within the RWQCB?

25 A I don't know.

(Deposition of Christopher Means, Appendix E, at Exhibit 20, page 107:21-25.)

26 The Moritzes repeatedly requested that the RWQCB consider their lack of ability to pay for the  
27 onerous requirements of the CAO. There is no evidence that RWQCB ever considered such evidence,  
28 even though the Moritzes presented such evidence to the RWQCB. There very few words said by any

1 Regional Board members during the February 11, 2009 hearing, and no words were devoted to a  
2 consideration of whether the Moritzes had the ability to pay for the CAO's requirements.

3 The Moritzes are without the ability to pay for the \$60,000 worth of engineering costs necessary  
4 to implement the stream restoration plan. They simply do not have the funds to proceed with the work  
5 set forth in the CAO. RWQCB failed to follow its own standards by failing to consider the dischargers'  
6 resources.

7 Moreover, the California Code of Regulations require that the regional Board take into account a  
8 discharger's resources in determining schedules for investigation and cleanup and abatement. 23 Cal.  
9 Code Regs § 2907, at IV. RWQCB could have, and perhaps should have scheduled compliance  
10 deadlines for some years hence to allow time for economic recovery and for the Moritzes to gain the  
11 ability to respond to the CAO. But again, there is no evidence that the RWQCB ever considered the  
12 dischargers' resources in scheduling the CAO's deadlines consistent with section 2907 of the California  
13 Code of Regulations. Accordingly, the CAO should be withdrawn, rescinded, dismissed or modified.

14 **K. THE REGIONAL BOARD VIOLATED 23 CALIFORNIA CODE OF REGULATIONS**  
15 **SECTION 2907, WHICH REQUIRES THE NAMING OF OTHER DISCHARGERS AND**  
16 **REQUIRES CONSISTENT STANDARDS FOR SIMILAR CIRCUMSTANCES:**

17 The RWQCB is *required* to name other dischargers. The RWQCB is *required* to apply  
18 consistent standards to similar circumstances.

19 II. The policies Regional Water Boards *shall apply* in overseeing: (a) investigations to  
20 determine the nature and horizontal and vertical extent of a discharge and (b) *appropriate*  
21 *cleanup and abatement measures*.

22 The Regional Water Board *shall*:

23 ...

24 *Name other dischargers as permitted by law;*

25 ...

26 *Prescribe consistent standards for similar circumstances; . . .*

27 23 Cal. Code Regs §§ 2907.

28 Notwithstanding these *mandatory* legal requirements, the RWQCB neither named other  
dischargers such as the City of Poway or adjacent property owners, nor applied consistent standards to  
similar circumstances. The Moritzes presented evidence that adjacent property had been repeatedly  
tilled by a tractor that actually was caught in the act of performing the very same type of grading for

1 which the Moritzes have been held liable. (Appendix E, Exhibit 15.) Moreover, and has developed on  
2 the record through cross examination of Christopher Means, the one-time stream bed that existed to the  
3 north of the Moritzes' property has been buried and as of the date of Exhibit 15, December 30, 2008, had  
4 hay bales in the north northwest/south southeast flowing dry wash/ephemeral stream. The Moritzes  
5 showed this very problem graphically in their opening and closing remarks and PowerPoint slides.  
6 (Exhibits F and G.)

7 The neighboring property clearly had a lack of vegetative BMPs, a lack of sediment control, a  
8 lack of erosion control active and ongoing grading, active and ongoing grading within two dry  
9 washes/ephemeral stream beds, an unlined earthen swale with a lack of energy dissipaters, filled-in  
10 ephemeral streams, all of which conditions are the bases of the Moritzes' liability. During the significant  
11 December 18, 2008 rainstorm, the Moritzes' property clearly is inundated with high velocity, sediment-  
12 laden water. Clearly the upgradient property owner is a discharger — if the Moritzes are dischargers.  
13 As Bill Moritz testified at the February 11, 2008 hearing, the headwaters of the ephemeral drainage  
14 come from an impervious City of Poway Street that dumps water ultimately into neighboring properties,  
15 and then to the Moritzes' property.

16 Likewise, there are multiple other culverts in the area. (Appendix E at Exhibit 10; see also  
17 appendix F.) The nearby culverts have no permits, and have no streambed alteration agreements, but  
18 exist nonetheless. In fact, these other culverts in the area were exactly what Bill Moritz used as a model  
19 for his own culvert.

20 If the Moritzes are dischargers, and RWQCB held is to honor the mandatory rule of law set forth  
21 in 23 Cal. Code Regs §§ 2907, then it *must* name these other dischargers. Alternatively, the CAO  
22 should be rescinded, withdrawn or dismissed. But naming only that Moritzes in the circumstances  
23 *violates* 23 Cal. Code Regs §§ 2907 by failing to name other dischargers and by failing to apply  
24 consistent standards to similar circumstances. Unless RWQCB names other dischargers and treats all  
25 similar circumstances alike, 23 Cal. Code Regs §§ 2907 becomes meaningless surplusage, contrary to  
26 rules of statutory construction. The regional Board should adhere to the rule of law and should either  
27 modify the CAO to name all dischargers, or it should rescind, withdraw or dismiss the CAO.  
28

The State Board and Regional Boards may adopt resolutions that waive discharge requirements for nonpoint sources. Water Code section 13260 (A), (B), 13263 (A), 13264 (A) (3), AND 13269.

**CONCLUSION:**

There is an absence of evidence that the Moritzes' useful fill and storm-water pipe were anything but useful; they were not useless discards or "waste." Moreover, the water that falls on the Moritzes' property during rains ends flows only approximately 3 days per year, not enough to call their dry backyard "waters of the state" or "waters of the United States." Consequently, the CAO findings of violations of multiple Water Code sections and of the RWQCB's region nine Basin Plan are wrong, and the CAO should be rescinded, withdrawn, or dismissed.

The RWQCB that is holding the Moritzes to the strict letter of the law is itself ignoring the rule of law. The RWQCB ignored the governor's Executive Order suspending WDR requirements and authorizing corrective measures following the Witch Creek fires. The Moritzes should have been given the benefit of the governor's Executive Order. The RWQCB is required to treat similar circumstances similarly and to name other dischargers, but failed to do so despite clear evidence that the City of Poway's storm water flows onto the Moritzes' neighbors property unabated and then across the neighbors' property's field-in ephemeral drainage over tilled and graded property without any BMPs — yet only the Moritzes have been treated as wrongdoers, contrary to regulatory requirements set forth in

1 23 Cal. Code Regs §§ 2907. Either all dischargers ought to be named, or none of them. The CAO  
2 accordingly should be rescinded, withdrawn, dismissed or modified.

3 The RWQCB failed to follow its own promises. It promises the public in its Basin Plan that it  
4 will consider the dischargers' resources. It promises the public that it will take into account economic  
5 considerations in establishing water quality objectives for specific areas. But there is no evidence of  
6 either occurring here. No evidence was presented by the prosecution team or the RWQCB in response  
7 to these allegations. There was no deliberation on these issues by the Regional Board. The Moritzes are  
8 entitled to fair consideration of all of their positions expressed in their petition and as set forth in the  
9 written record.

10 Dated: March 9, 2009

THE SIMPSON LAW FIRM,  
A Professional Corporation  
Attorneys for Bill and Lori Moritz

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14 By: Douglas J. Simpson  
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IN THE MATTER OF:	)	APPENDIX B, PART 1
	)	
	)	
THE CALIFORNIA REGIONAL WATER	)	BILL AND LORI MORITZ'S REQUEST FOR
QUALITY CONTROL BOARD, SAN DIEGO	)	STAY OF ENFORCEMENT OF CAO R9-2008..
REGION,	)	0152
	)	
	)	[23 Cal. Code Regs § 2053]
	)	
v.	)	Date of RWQCB Action: Feb 11, 2009
	)	
	)	
DR. WILLIAM and LORI MORITZ	)	
	)	

**1. PETITIONERS WILL BE SUBSTANTIALLY HARMED IF THEY ARE NOT GRANTED A STAY OF THE CAO:**

First, there is ongoing litigation between the City of Poway and Bill and Lori Moritz, San Diego Superior Court case number 37-2008-00088427-CU-OR-CTL. The litigation will decide many if not all of the issues raised by RWQCB in the CAO. Bill Moritz alleges in his Cross-Complaint against the City

1 of Poway that the City repeatedly assured him that the work he was performing was permissible, and fell  
2 within the exception to the grading-permit requirements of the City of Poway ordinances.

3 Moreover, the City of Poway is a subpermittee of the RWQCB's NPDES permit, and is under a  
4 mandatory duty to implement specific storm-water management practices. Bill Moritz alleges that the  
5 City failed to implement appropriate storm-water management practices and made promises on which he  
6 was entitled to rely, resulting in the work he performed at the site and ultimately in the RWQCB's CAO.

7 There are a number of related issues in the litigation that will ultimately be decided in a court of  
8 law after complete discovery, motion work, and trial. The RWQCB need not act, let alone act now, but  
9 instead can stay these proceedings while awaiting the outcome of the City of Poway litigation that will  
10 decide many or perhaps all of the issues before the RWQCB and SWRCB.

11 Second, Bill and Lori Moritz, like many companies and individuals in the United States, have  
12 had retirement investments and home equity evaporate in the recent recession. Additionally, their  
13 mortgage payment has increased by \$600 monthly as a consequence of escalating tax rates. The  
14 Moritzes do not have the current assets or the ability to borrow to retain the services of civil engineering  
15 assistance. The Moritzes have not paid this firm's invoices for October, November, or December 2008,  
16 let alone any during calendar year 2009. They simply cannot comply with the CAO.

17 The Moritzes have paid \$10,000 of the \$20,000 that an initial expert, Geosyntec, charged for a  
18 stream-restoration plan. (See Appendix E at Exhibit 13.) Additionally, the Moritzes have been told that  
19 the civil engineer will likely incur expenses of \$23,000, plus City of Poway grading-permit fees on the  
20 order of \$12,000, plus a security deposit of unknown amount, plus sub consultants of \$3200 (Appendix  
21 E at Exhibit 14) — planning and engineering costs alone of approximately \$60,000 (\$20,000 + \$23,000  
22 + \$12,000 + \$3200 + unknown security deposit). This \$60,000 amount is exclusive of the costs  
23 necessary to actually implement the engineered plans, and is exclusive of costs to report back to  
24 RWQCB that the work has been performed perhaps bringing the total to something in the range of  
25 \$100,000 — money that the Moritzes can neither pay nor borrow.

26 The CAO imposes a variety of deadlines. The first deadline is immediate, requiring immediate  
27 site-stabilization measures. Site-stabilization measures have largely been installed already, some by  
28 Petitioner Bill Moritz, and some by the City of Poway, under the authority of an abatement warrant.